

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-2180

B

United States Court of Appeals
FOR THE SECOND CIRCUIT

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Plaintiff

against

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN
COUNTY, STERLING NATIONAL BANK & TRUST COMPANY OF
NEW YORK, NATIONAL BANK OF NORTH AMERICA, DAGMAR
AUERBACH STUART, OLGA AUERBACH, HELGA RUTH JEN-
NINGS, IRVING GEIST, KENNETH DEMESKI, ROYAL S. MARKS,
SAMUEL HADDAD, NATALIE HADDAD, HENRY HECHT, SR.,
ALICE HECHT, MARY ELLEN HECHT and HENRY HECHT,
Jr.,

Defendants,

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN
COUNTY, DAGMAR AUERBACH STUART, OLGA AUERBACH, and
HELGA RUTH JENNINGS,

Defendants-Appellees,

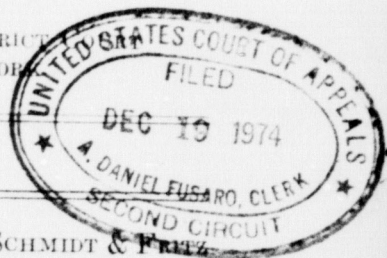
and

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt,

Intervenor-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT
SOUTHERN DISTRICT OF NEW YORK

APPENDIX



BLEAKLEY, PLATT, SCHMIDT & FRITZ
Attorneys for Defendant-Appellee
Third National Bank of
Hampden County
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New York, New York 10005
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Relevant Docket Entries.

DATE	PROCEEDINGS
May 12-70	Filed complaint issued summons.
May 12-70	Filed affidavit and order appointing Edward T. Pots to serve the summons and complaint. Clerk.
May 25-70	Filed debt Sterling National Bank & Trust Co. ANSWER to complaint.
May 25-70	Filed debt Sterling National Bank & Trust Co. Proof of Claim.
May 25-70	Filed Notice of Appearance for debt. Irving Geist.
June 3-70	Filed Affidavit of Lee Franklin.
June 3-70	Filed Order to Show Cause re: Deposit Monies, etc. Ret. 6/9/70.
June 5-70	Filed debt Dasha Auerbach Stuart ANSWER to complaint.
Jun 9-70	Filed debt Dasha Auerbach Stuart affidavit in opposition to order to show cause.
Jun 9-70	Filed debt Irving Geist affidavit in opposition to order to show cause.
Jun 9-70	Filed notice of appearance for Lawrence E. Simon.
Jun 9-70	Filed notice of appearance for debt's Henry Hecht Sr. Alice Hecht, Mary Ellen Hecht and Henry Hecht Jr.
Jun 9-70	Filed debt Irving Geist ANSWER to complaint.
June 9-70	Filed stipulation and order extending debts. Henry Hecht, Sr., Alice Hecht, Mary Ellen Hecht and Henry Hecht, Jr. to answer complaint to 6/30/70. So ordered. McGohey, J.

Relevant Docket Entries.

DATE	PROCEEDINGS
Jun 12-70	Filed deft's Royal S. Marks, Samuel Haddad and Natalie M. Haddad ANSWER and cross claim.
Jun 12-70	Filed deft's statement of claim.
Jun 15-70	Filed deft 3rd National Bank of Hampden order to show cause. Re Dismiss Interpleader.
Jun 15-70	Filed memorandum of law in support of motion of deft to dismiss interpleader.
June 22-70	Filed Answering Affidavit.
June 22-70	Filed Plaintiff's Memorandum of Law in opposition to motion.
Jun 25-70	Filed deft National Bank of North America ANSWER to complaint.
Jun 25-70	Filed deft National Bank of North America Statement of Claim.
June 29-70	Filed Answer to Statement of Claim. of defts. Royal S. Marks, Samuel Haddad and Natalie M. Haddad, (answer to statement of claim filed by deft. Irving Geist).
June 29-70	Filed Answer to Statement of Claim. of defts. Royal S. Marks, Samuel Haddad and Natalie M. Haddad, (answer to statement of claim filed by deft. Dasha Auerbach Stuart, Executrix of Estate).
Jul 20-70	Filed ANSWER of deft. Dasha Auerbach Stuart, Executrix, to the answers of the other defendants.
Jul 23-70	Filed ANSWER of deft. Irving Geist to cross-claim. of Royal S. Marks, Samuel Haddad, etc.
Jul 23-70	Filed Answer of Irving Geist to answer of Sterling Natl. Bank & Trust Co. of NY.

Relevant Docket Entries.

DATE	PROCEEDINGS
Jul 23-70	Filed Answer of deft. Irving Geist to answer of Natl. Bank of North America.
Jul 23-70	Filed Answer of deft. Irving Geist to Answer of Dasha Auerbach Stuart.
Jul 27-70	Filed deft's Marks & Haddad Answer to proof of claim.
Jul 27-70	Filed deft's Answer to statement of claim. (Marks & Haddad).
Sep. 23-70	Filed MEMORANDUM AND ORDER. National Bank of North America has consented only to the request for plttf's discharge. Kenneth Dembski has merely indicated that his claim has been paid and no further steps will be taken by him in this case. Third National Bank of Hampden County motion to dismiss is withdrawn. Plttf's motion is granted as to items 1 and 2 as indicated. SETTLE ORDER ON NOTICE. Lasker J.—mailed notice.
Oct. 15-70	Filed Order that based upon the deposit in the Registry of this Court of \$144,382.22 by plaintiffs, defendants, and each of them, etc. are permanently enjoined from instituting or prosecuting claims or suits, etc.; further ordered that plaintiff is discharged from all liability to debts, and each of them, and all persons claiming by, through or under them with reference to the said sum of \$144,382.22 deposited with this court; decision on motion for allowance for attorney's fees is reserved, etc; further ordered that defendants may file answers and statement of claim within 20 days after entry of this order, etc. Lasker, J. (mailed notice).
Oct. 27-70	Filed Proof Claim.
Nov. 4-70	Filed Proof of Claim. of deft. Irving Geist.

Relevant Docket Entries.

DATE	PROCEEDINGS
Nov. 6-70	Filed Proof of claim. of deflt Dasha Auerbach Stuart.
Nov. 9-70	Filed Proof of claim. of deflts Royal S. Marks, Samuel Haddad and Natalie Haddad.
Nov. 10-70	Filed ANSWER of Third National Bank of Hampden County, and Statement of Claim of deflt. Third National Bank of Hampden County.
Nov. 12-70	Filed Proof of Claim of deflts. Royal S. Marks, Samuel Haddad and Natalie Haddad.
Nov. 16-70	Filed stipulation and order extending deflt. Lawrence E. Simon's time to serve and file pleadings in conformity with paragraph of order of Lasker, J. to 11/30/70. So ordered. McGohey, J.
Nov. 19-70	Filed ANSWER of deflt. Irving Geist to answer and statement of claim of Third National Bank of Hampden County.
Nov. 19-70	Filed ANSWER of deflt. Irving Geist to proof of Claim of Sterling National Bank & Trust Co. of New York.
Nov. 19-70	Filed ANSWER of deflt. Irving Geist to Statement of Claim of National Bank of North America.
Nov. 19-70	Filed ANSWER of deflt. Irving Geist to proof of claim of Royal S. Marks, Samuel Haddad and Natalie Haddad.
Nov. 24-70	Filed Answer of deflts. Royal S. Marks, Samuel Haddad and Natalie M. Haddad to Proof of Claim.
Nov. 30-70	Filed ANSWER and Statement of Claim of deflt. Lawrence E. Simon.

Relevant Docket Entries.

DATE	PROCEEDINGS
Dec. 4-70	Filed stipulation and order substituting LoFrisco Gallagher & Kenny as attys. for Defendant Lawrence E. Simon, in place and stead of Maurice A. M. Edkiss. So ordered. Croake, J.
Dec. 15-70	Filed ANSWER of Irving Geist to Answer of deft. Dasha Auerbach Stuart.
Dec. 15-70	Filed ANSWER of deft. Irving Geist to Answer and Statement of Claim of deft. Lawrence E. Simon.
Dec. 18-70	Filed Plaintiff's Answer to cross-claim of deft. Lawrence E. Simon.
Dec. 28-70	Filed Answer of Royal S. Marks, Samuel Haddad and Natalie M. Haddad to Claim of deft. Lawrence E. Simon.
Dec. 29-70	Filed Answer to statement of claim of deft Lawrence E. Simon (deft Dasha Auerbach).
Apr. 2-71	Filed Deft Lawrence E. Simon affdvt & notice of motion ret. 4-13-71 granting leave to LoFrisco Gallagher & Kenny to withdraw as attys of record for deft Simon.
Apr. 6-71	Filed Deft. Stuart etc. notice of deposition.
Apr. 7-71	Filed affdvt of Kurt J. Woff atty for deft. Dasha Auerback Stuart in connection with the motion made by Messrs LoFrisco Gallagher & Kenny to withdraw as atty of record.
May 3-71	Filed memo endorsed on motion filed 4-2-71 —Motion disposed of in accordance with stip to be submitted—So ordered—Motley, J.
May 4-71	Filed Consent order of substitution of atty. for deft Simon—So ordered—Motley, J.

Relevant Docket Entries.

DATE	PROCEEDINGS
Jan. 19-72	Filed answer of deft. D.A. Stuart to the answers & claims of other defts.
Feb. 16-72	Filed deft's 3rd. National Bank of Hampden County affidavit & notice, of motion for summary judgment ret. 2-29-72.
Feb. 16-72	Filed deft's joint statement under rule 9(g).
Feb. 16-72	Filed deft's memorandum of law in support of his motion ret. 2-29-72.
Feb. 17-72	Filed deft's (Dasha Auerbach Stuart) affidavit & notice of motion, summary judgment ret. 2-29-72.
Feb. 17-72	Filed joint statement under rule 9(g).
Feb. 17-72	Filed deft's memorandum of law in support of his motion for summary, judgment ret. 2-29-72.
Feb. 23-72	Filed affirmation by H. Gurahian, in opposition to motions for summary, judgment ret. 2-29-72.
Feb. 25-72	Filed stip to adj. joint motion for summary judgment from 2-29-72 to 3-21-72.
Mar. 13-72	Filed affidavit of James Sawyer in opposition to motion for partial, summary judgment.
Mar. 14-72	Filed additional affidavit by James Sawyer in opposition to motion for partial summary judgment.
Mar. 15-72	Filed deft's (Lawrence E. Simon) affidavit & notice of cross-motion, summary judgment ret. 3-21-72. (9g statement included)
Mar. 15-72	Filed deft's (Lawrence E. Simon) memorandum of law in support of his motion ret. 3-21-72.

Relevant Docket Entries.

DATE	PROCEEDINGS
Mar. 15-72	Filed affidavit by E.T. Post Re: motions by deft's.
Mar. 20-72	Filed Trustee's affidavits & notice of motion dismiss complaint, ret. 3-21-72.
Mar. 20-72	Filed Trustee's memorandum in support of his motion ret. 3-21-72.
Jul. 14-72	Filed MEMORANDUM: The motions for summary judgment are denied with, leave to renew the motions after the trustee has answered. So ordered. Bauman, J. Mailed notice.
Aug. 8-72	Filed ANSWER of Robert B. Schindler, as Trustee, to complaint, and Statement of Claim.
Aug. 8-72	Filed AMENDED ANSWER of Robert B. Schindler to Complaint, and Statement of Claim.
Aug. 10-72	Filed defts Marks and Haddads answer to proof of claim.
Jan. 24-73	Filed Deft's Dasha A. Stuart affidavit & show cause order ret. before, Frankel, J. on 2-6-73 to enjoin deft. Simon from proceeding with his motion in the Supreme Court.
Jan. 24-73	Filed deft's Dasha A. Stuart's memorandum of law in support of his motion.
Feb. 15-73	Filed affidavit by C.G. Kleinbaum in opposition to Stuart's motion.
Feb. 15-73	Filed deft's memorandum of law in opposition to motion by Stuart.
Feb. 15-73	Filed affidavit of Irwin B. Robins in reply to answering papers by deft. Simon in opposition to motion.

Relevant Docket Entries.

DATE	PROCEEDINGS
Feb. 15-73	Filed def't's Stuart's memorandum (reply) in support of motion.
Feb. 26-73	Filed MEMORANDUM: Def't's Stuart's motion to enjoin the motion of def't. Simon in the Supreme Court of the State of New York, County of New York, is denied. So ordered. Frankel, J. M/n.
Feb. 26-73	Filed Sur-reply affidavit of C.G. Kleinbaum to affidavit of I.B. Robbins.
Mar. 13-73	Filed Order that Proposed findings of fact, if any, in addition to those the parties have stipulated, proposed conclusions of law, & trial briefs will be served & filed on or before 4-2-73. Trial, will commence at 10 A.M. on 4-18-73. So ordered. Frankel, J.
Apr. 2-73	Filed def't's (Stuart) proposed additional findings of fact & conclusions of law.
Apr. 2-73	Filed trial memorandum of def't. (Stuart) as executrix the last will, & testament of Josef Auerbach.
Apr. 3-73	Filed def't's L.E. Simon trial memorandum.
Apr. 10-73	Filed def't's Stuart's affidavit & Show cause order ret. on 4-11-73 Re: written request for admission.
Apr. 13-73	Filed MEMO-END. on order to show cause dtd 4-10-73. Motion withdrawn.
Apr. 3-73	Filed def't's Simon Proposed findings of fact & conclusions of law.
Apr. 3-73	Filed notice of appearance for R.B. Schindler, Trustee in Bankruptcy, of L.E. Simon.
Apr. 10-73	Filed D.A. Stuart request for admission.

Relevant Docket Entries.

DATE	PROCEEDINGS
Apr. 16-73	Filed Order that deft's Royal S. Marks, Samuel Haddad & Natalie, Haddad's statement of claim previously served & filed herein be, deemed & same is withdrawn etc. Frankel, J.
Apr. 26-73	Before Frankel, J. Non-Jury trial begun.
Apr. 27-73	Trial continued & adjourned, referred to Magistrate Goettel to hear, & report.
May 18-73	Filed Notice of Settlement and Order—Ordered that the issues in the above entitled action are referred to Mag. Goettel to hear and report, etc. FRANKEL, J. (mn)
Jun. 1-73	Filed deft's third National Bank Notice to take deposition of deft. L. E. Simon on 6-8-73.
June 14-73	Filed transcript of record of proceedings dated Apr. 27-73.
Aug. 15-73	Filed transcript of the record of proceedings dtd. Apr. 26-27—1973.
Feb. 25-74	PRE-TRIAL CONFERENCE HELD BY MAG. GOETTEL.
March 13-74	Filed special Master's report of Magistrate Goettel.
March 13-74	Filed special Master's supplemental report of Magistrate Goettel.
Apr. 15-74	Filed deft. Third National Bank of Hampden County objections to Master's report.
Apr. 15-74	Filed memorandum in support of deft. Third National Bank's objections to Special Master's report.
May 16-74	Filed deft. Dasha Auerbach Stuart, as Executrix, etc. notice of motion for an order to confirm and adopt the report of the Special Master. Ret. 5-28-74.

Relevant Docket Entries.

DATE	PROCEEDINGS
July 3-74	Filed Memorandum—Order—the court approves and adopts the rulings proposed by Magistrate Goettel. Proposed judgments should be submitted on notice. It is so ordered—FRANKEL, J. (m/n)
July 31-74	Filed Final Judgment—ordered that out of the sum of \$144,382.22 in the Registry of the Court, the Clerk of the Court pay out the following amounts: <ol style="list-style-type: none"> <li data-bbox="522 658 1077 720">(1) To plttf's counsel, Post, Hopkins & Demott, the sum of \$15,926.48 <li data-bbox="522 733 1077 821">(2) To deft. Third National Bank of Hampden County the sum of \$87,050.97. <li data-bbox="522 834 1077 922">(3) To deft. Dasha Auerbach Stuart, Executrix under the Will of Josef Auerbach, the sum of \$41,404.77. <p data-bbox="512 938 1077 1290">—that plttf. Massachusetts Mutual Life Insurance Co. shall pay from the monies held in escrow by it prior to 1-1-73, the following sums to the following persons as indicated—and that plttf., Massachusetts Mutual Life Insurance Co. shall pay out of any renewal commissions which have accrued to the account of Lawrence E. Simon since 1-1-73 the following sums as indicated. FRANKEL, J. Judgment entered—7-31-74. Clerk. Ent. 8-1-74. (m/n)</p>
Aug. 8-74	Filed Robert B. Schindler, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, Intervenor, notice of appeal from final judgment filed 7-31-74. Mailed copies to: Post, Hopkins & Demott—Yellin. Kenner & Levy—Bleakely, Pratt, Schmidt & Fritz—Harry Gurahian, Esq.—Lee

Relevant Docket Entries.

DATE

PROCEEDINGS

Franklin, Esq.—Maurice Iserman, Esq.—
Martin, Bloom, Lipton & Van De Walle—
and Hyman L. Kowa. Ent—8-9-74.

- Aug. 9-74 Filed affdvt. of Robert B. Schindler, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, Intervenor, and order to show cause with a stay that plttf. Massachusetts Mutual Life Insurance Co. and its attys, etc, and the defts. Lawrence E. Simon, Third National Bank of Hampden County and Dasha Auerbach Stuart, Executrix under the Last Will and Testament of Josef Auerbach why an order should not be entered—directing the said plttf's attys and the defts. as indicated to return to the Registry of this Court checks issued to said plttf's attys and said defts. by the Clerk of this Court as indicated that pending a hearing and determination of this motion, the plttf and said defts., etc. are hereby restrained from taking any steps to execute upon or enforce the provisions of said judgment as indicated. Ret. 8-12-74 at 4:00 P.M. Frankel, J.
- Aug. 13-74 Filed deft. Dasha Auerbach Stuart, executrix under the last will and testament of Josef Auerbach ("Stuart") affdvt. of Irwin B. Robins in opposition to motion of Intervenor Robert B. Schindler as Trustee in Bankruptcy of Lawrence E. Simon, etc.
- Aug. 13-74 Filed plttf's answering affdvt. of Edward T. Post.
- Aug. 13-74 Filed deft. Third National Bank of Hampden County affdvt. of Frank A. Fritz in opposition to motion of Intervenor Trustee.

Relevant Docket Entries.

DATE	PROCEEDINGS
Aug. 13-74	Filed affdvt. of personal service of Robert B. Schindler.
Aug. 13-74	Filed affdvt. of personal service of Cynthia Levenson.
Aug. 13-74	Filed memo endorsed on order to show cause with a stay filed 8-9-74. Motion granted on terms directed at oral argument. Counsel to prepare order, on stipulation if possible. Frankel, J. (m/n)
Sept. 10-74	Filed trans of proceedings dtd Sept 21, 25, 1973.
Sept. 10-74	Filed proposed findings of facts of Third National Bank.
Apr. 15-74	Filed memo in support of Defts objections to Special Masters Report.
Sept. 10-74	Filed proposed conclusions of Law of Third National Bank.
Sept. 10-74	Filed proposed additional findings of fact and conclusions of law of intervenor.
Sept. 10-74	Filed objections to Special Masters Report and Supplemental Report.
Sept. 10-74	Filed Trustees reply memo of Law to reply memo of Lasha Auerbach Stuart.
Sept. 10-74	Filed reply memo with respect to res judicata
Sept. 10-74	Filed trustees memo of Law on the defense of Res Adjudicata raised by the debt D./Stuart.
Sept. 10-74	Post Trial memo of North America Bank.
Sept. 10-74	Reply post trial memo of Rbt Schindler.
Sept. 10-74	Filed post trial mem of third national Bank.

Relevant Docket Entries.

DATE	PROCEEDINGS
Sept. 10-74	Filed supplemental trial memo of Third National Bank in opposition to trial memo of R. Schindler.
Sept. 10-74	Filed post trial memo of Third National Bank.
Sept. 10-74	Filed post trial memo of deft Dasha Auerbach as executrix.
Sept. 10-74	Filed supplemental trial memo of R. Schindler.
Sept. 10-74	Filed trial memo of Third National Bank.
Sept. 10-74	Filed trial memo of R. Schindler.
Sept. 10-74	Filed pretrial memo of deft Third National Bank.
Sept. 10-74	Filed Pre Trial Memo. OSHR.
Sept. 10-74	Filed Pre Trial Memo. Pltff.
Sept. 10-74	Filed pltffs. Pre Trial Memorandum.
Sept. 10-74	Filed Pre Trial Memorandum Statement of Federal Court's Jurisdiction.
Sept. 10-74	Filed Stipulation of Facts.
Sept. 13-74	Filed Notice that the record on appeal has been certified and transmitted to the U.S.C.A.P. on 9-13-74.
Oct. 18-74	Filed Consent Order—that Olga Auerbach, Dagmar Auerbach Stuart and Helga Ruth Jennings are substituted for Dasha Auerbach Stuart and the title of the within action is changed as indicated.—pltff. Mass. Mutual is directed to deposit forthwith in the Registry of this Court to the credit of the within action the sum of \$188,565.83 etc. as indicated whereupon pltff. shall be relieved and is charged from any and all further liabil-

Relevant Docket Entries.

DATE

PROCEEDINGS

ity to the defts. and intervenor etc. as indicated—the Judgment Fund shall be used to purchase a certificate of deposit for the term of sixty days from Manufacturers Hanover Trust Co., 350 Park Ave.—New York, N.Y. 10022 etc. as indicated—in purchasing a new certificate of deposit at the expiration of each sixty-day period, the amount of repurchase is to include the original amount of the Judgment Fund, the Future Fund plus all interest accrued, etc. as indicated each Judgment creditor and/or Future Judgment creditor shall receive from the Judgment Fund, Future Fund and Future Fund earnings, the amounts as indicated—and upon either withdrawal of the appeal herein or if the appeal is prosecuted to its conclusion upon the entry of a new order for final judgment, the Court shall direct the Clerk of the Court to make payments to the parties as determined in accordance with paragraph 5 of this order. So ordered—FRANKEL, J.

Oct. 30-74 Filed plttf's notice of deposit in the Registry of this Court the sum of \$188,565.83 pursuant to order of Frankel, J. dated and filed 10-18-74.

**Complaint in Interpleader Under 28 U. S. C. A.,
Section 1335.**

Plaintiff, Massachusetts Mutual Life Insurance Company by its attorneys Friend, Post & Hopkins alleges on information and belief as follows:

1. Plaintiff, Massachusetts Mutual Life Insurance Company (hereinafter called Mass. Mutual) is a corporation organized and existing under the laws of the Commonwealth of Massachusetts. Its principal place of business is in Springfield, Massachusetts.
2. Defendant Third National Bank of Hampden County, formerly know as Third National Bank & Trust Company (hereinafter called Third National), and defendant National Bank of North America (hereinafter called National Bank) and Sterling National Bank & Trust Company of New York (hereinafter called Sterling National) are national banking associations organized and doing business under the provisions of the National Banking Act. The Third National has its principal place of business in Springfield, Massachusetts. National Bank and Sterling National have their principal places of business in New York City.
3. Dasha Auerbach Stuart is the Executrix of the last will and testament of Josef Auerbach—California.
4. Defendant Irving Geist is an individual who resides in New York, New York.
5. Defendant Kenneth Dembski is an individual who resides in New York, New York.
6. Defendant Lawrence E. Simon is an individual who resides in New York, New York.

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Section 1335.*

7. Defendant Royal S. Marks is an individual who resides in New York New York.

8. Defendants Samuel Haddad and Natalie Haddad are individuals who reside in New York, New York.

9. Defendants Henry Hecht, Sr. and Alice Hecht are individuals who reside in Baltimore, Maryland.

10. Defendant Mary Ellen Hecht, M. D. is an individual who resides in Long Island, New York.

11. Defendant Henry Hecht, Jr. is an individual who resides in New York, New York.

12. This complaint is filed pursuant to the Federal Interpleader Act of June 1948 c. 646, 62 Stat. 931, 28 U. S. C. A. 1335 (1963).

13. The amount in controversy, which has been deposited into the Registry of this court exceeds \$500.00, namely \$144,382.22.

14. Defendant Lawrence E. Simon, a former general agent of plaintiff executed a contract with plaintiff dated July 1st, 1932. A copy of which is marked Exhibit "A", attached hereto and made a part hereof.

15. On or about November 10, 1938, defendant Lawrence E. Simon executed a document by which he collaterally assigned and transferred to Third National all his right, title and interest in and to all renewal commissions thereafter becoming due and payable to him under the contract designated Exhibit "A" and plaintiff executed said contract showing its consent to the assignment subject to a reserva-

*Complaint in Interpleader Under 28 U. S. C. A.
Section 1335.*

tion of its rights under said contract. A true copy of said assignment and consent, marked Exhibit "B", is attached hereto and made a part hereof.

16. On December 31, 1962 said contract, marked Exhibit "A" was terminated.

17. Defendant Lawrence E. Simon executed a contract with plaintiff dated September 16, 1964. A copy of said contract, marked Exhibit "C", is attached hereto and made a part hereof.

18. Defendant Lawrence E. Simon executed a contract with H. C. Copeland & Company, Inc., a former general agent of plaintiff dated January 2, 1963.

19. Defendant Lawrence E. Simon executed a contract with Desmond J. Lizotte, a general agent of plaintiff dated March 16, 1964.

20. Plaintiff made payments to Lawrence E. Simon subsequent to the execution of Exhibit "B", pursuant to its terms, until March 29, 1967.

21. Prior to March 29, 1967, defendant Lawrence E. Simon defaulted in making payment to Third National of the indebtedness mentioned in Exhibit "B" and Third National gave notice of said default to plaintiff and defendant Simon.

22. Commencing in March 29, 1967, plaintiff made payments to Third National, pursuant to the terms of Exhibit "B", until on or about January 4, 1968, when plaintiff was served in New York County, New York, with a Subpoena and Restraining Notice in the case of Irving Geist v.

*Complaint in Interpleader Under 28 U. S. C. A.
Section 1335.*

Lawrence E. Simon, Supreme Court, County of New York, Index No. 21099/67. Said notice referred to an alleged judgment debt of \$41,620.00.

23. Third National has advised plaintiff that as of January 4, 1968, Lawrence E. Simon was indebted to Third National in the amount of \$132,055.20, plus interest, but plaintiff has made no payment of renewal commission, otherwise due to Lawrence E. Simon, either to Lawrence E. Simon, Third National or any other person since January 4, 1968.

24. On or about January 19, 1968, Plaintiff was served in New York County, New York, with a garnishment notice in an action entitled Josef Auerbach v. Pension Corporation of America and Lawrence Simon, Index No. 4179/68 based on an alleged judgment debt in the amount of \$71,000.00.

25. On or about June 13, 1968, plaintiff was served in New York County, New York with a restraining notice to garnishee in an action entitled National Bank of North America v. Pension Corporation of America and Lawrence E. Simon, Supreme Court County of New York Index No. 8724/68 based on an alleged judgment debt in the amount of \$242,435.00 in favor of National Bank of North America v. Pension Corporation of America and Lawrence E. Simon and an alleged judgment in the amount of \$14,212.56 in favor of National Bank of North America v. Lawrence E. Simon.

26. On or about October 14, 1968, plaintiff was served in New York County, New York, with a subpoena and Restraining Notice in an action entitled Sterling National Bank and Trust Company of New York v. Pension Corpora-

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Section 1335.*

tion of America and Lawrence E. Simon Civil Court of the City of New York, County of New York, Index No. 59339/68, based on an alleged judgment debt of \$2,025.59.

27. On or about October 21, 1968, plaintiff was served in New York, New York, with a Restraining Notice to Garnishee in an action entitled Kenneth Dembski v. Lawrence E. Simon, Civil Court of the City of New York, County of New York, Index No. 129,909/68, based on an alleged judgment debt of \$3,152.50.

28. Plaintiff's records also disclose the pendency of an action in the United States District Court for the Southern District of New York, Civil Action No. 1130/67, entitled Henry Hecht, et al. v. Lawrence E. Simon. Said action was dismissed under Rule 23 of said Court for lack of prosecution with prejudice, October 8, 1969.

29. Plaintiff's records further disclose that an involuntary petition in Bankruptcy was filed against Lawrence E. Simon on or about April 10, 1968, by Royal S. Marks, Samuel G. Haddad and Natalie Haddad in the Federal District Court for the Southern District of New York, No. B 321/68. Said petition was dismissed for failure of proof showing insolvency, November 14, 1968.

30. To the best of plaintiff's knowledge and belief the foregoing restraints and claims are still awaiting resolution.

31. Plaintiff may be exposed to double or multiple liability because of the multiple claims made by defendants and pending suits in various jurisdictions. Plaintiff does not have an adequate remedy at law.

*Complaint in Interpleader Under 28 U. S. C. A.
Section 1335.*

32. Plaintiff admits that \$144,382.22 is due and owing to the person or persons entitled thereto, as of January 1, 1970, that it has no interest in said sum of \$144,382.22, and that it is a stakeholder; and said sum has been paid into the Registry of this Court.

33. Renewal commissions in additional sums may become due and owing from plaintiff for an indeterminate number of years in the future.

34. This complaint is filed in good faith, not in collusion with any of the claimants, and plaintiff has not admitted the claim of, or subjected itself to independent liability to, any one of the claimants.

WHEREFORE, plaintiff requests the Court to grant the following relief:

1. An order and decree:

(1) Requiring defendants to interplead and to allege in such interpleader their respective claims;

(2) Prescribing the manner in which and the person or persons to whom the sum of \$144,382.22 and future renewal commissions and other sums otherwise that may become due Lawrence E. Simon from plaintiff should be paid by the Clerk of the United States District Court for the Southern District of New York, and relieving plaintiff of all liability to defendants other than to make payments as so prescribed;

(3) Recognizing that plaintiff's obligation is a continuing one with regard to future commissions and other sums which accrue and would otherwise be due Lawrence E. Simon and accordingly permitting plaintiff to accumulate said future commissions and other sums and

*Complaint in Interpleader Under 28 U. S. C. A.
Section 1335.*

pay them into the Clerk of this Court, as they accrue, quarter-annually;

(4) Enjoining defendants from instituting or prosecuting any action in any Court against plaintiff to enforce in whole or in part any claim against it set forth in the Complaint except as a party to this action:


(5) Allowing plaintiff out of the sum paid into Court its costs and a reasonable attorney's fee; and

(6) Granting such other further relief as the Court shall deem proper.

Friend, Post & Hopkins
Attorneys for Plaintiff
Massachusetts Mutual Life
Insurance Company

By EDWARD T. POST
Edward T. Post
a Partner
Office & P. O. Address
One Madison Avenue
New York, N. Y. 10010
683-5100

Exhibit A, Contract Between Massachusetts Life Insurance Company and Lawrence E. Simon, dated July 1, 1932.

(See opposite )

Duties

Territory

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WITNESSES
1900

This Contract, Made this First day of July in the year one thousand
hundred and Thirty-Two between the Massachusetts Mutual Life Insurance Company, of Springfield,
Massachusetts, and Lawrence E. Simon of New York
the County of New York and State of New York

NEVERTHE: That in consideration of the mutual covenants hereinafter contained the said parties do hereby agree as follows:

- § 1. That said Company hereby appoints the said Lawrence E. Simon a General Agent of said Company, shall be his duty as such General Agent to solicit applications for life insurance in said Company, to collect and pay over premiums on such insurance effected, unless by direction of said Company they are to be otherwise collected, and to perform such other duties as may be required of him by said Company. He shall act exclusively for said Company, and shall tender to it all applications for insurance in said Company obtained by him or by persons in his employ or under his control; shall promptly forward to the Home Office of said Company all such applications, whether the local medical examiner have advised or failed to advise their acceptance; shall devote his entire time, to the exclusion of any other vocation, to the business of said Company; shall be governed in the transaction of said business strictly by the rules of, and the instructions from time to time given by, said Company.
- § 2. That said General Agent may, personally and by agents in his employ, solicit applications for insurance in said Company in the following territory:

Greater New York

subject, however, to the right of said Company, hereby reserved, to discontinue doing business in all or any part of said territory, and to employ other agents in said territory or any part thereof should the amount of new business effected therein by said General Agent be deemed insufficient by said Company, said General Agent to have no commission or other interest in the business of any agent so employed by said Company.

Agents

§ 3. That if said General Agent shall employ other persons to solicit applications for insurance, or in any other capacity in connection with his agency, he shall be responsible to said Company for all matters entrusted to them and for their acts and conduct relating to the business of said Company, and that such employment in the case of agents shall be by written contract, executed by said General Agent individually, without the use of the title given him by this contract, and any person so employed to solicit applications for insurance shall be designated by the title "Agent" only, unless a different title is authorized by said Company; and that all such contracts shall be made upon blanks furnished by said Company, and shall be executed in triplicate, one copy to be retained by said Company; and that said General Agent shall promptly give said Company written notice whenever a contract with an agent is terminated.

§ 4. That, subject to the provisions of this contract, said Company will allow said General Agent commissions upon premiums on new business effected under this contract by him and by agents in his employ, as follows:

Schedule of Commissions

Kind of Policy	First %	Renewal %	Kind of Policy	First %	Renewal %
Ordinary Life	50	7 1/2	Ordinary Endowment, 33 Years	41 1/2	7 1/2
Family Income, 10, 15 and 20 Years	45	7 1/2	" " 32 "	41	7 1/2
40 Payment Life	50	7 1/2	" " 31 "	40 1/2	7 1/2
39 " " " " " " " "	49 1/2	7 1/2	" " 30 "	40	7 1/2
38 " " " " " " " "	49	7 1/2	" " 29 "	39	7 1/2
37 " " " " " " " "	48 1/2	7 1/2	" " 28 "	38	7 1/2
36 " " " " " " " "	48	7 1/2	" " 27 "	37	7 1/2
35 " " " " " " " "	47 1/2	7 1/2	" " 26 "	36	7 1/2
34 " " " " " " " "	47	7 1/2	" " 25 "	35	7 1/2
33 " " " " " " " "	46 1/2	7 1/2	" " 24 "	34	7 1/2
32 " " " " " " " "	46	7 1/2	" " 23 "	33	7 1/2
31 " " " " " " " "	45 1/2	7 1/2	" " 22 "	32	7 1/2
30 " " " " " " " "	45	7 1/2	" " 21 "	31	7 1/2
29 " " " " " " " "	44 1/2	7 1/2	" " 20 "	30	7 1/2
28 " " " " " " " "	44	7 1/2	" " 19 "	29	7 1/2
27 " " " " " " " "	43 1/2	7 1/2	" " 18 "	28	7 1/2
26 " " " " " " " "	43	7 1/2	" " 17 "	27	7 1/2
25 " " " " " " " "	42 1/2	7 1/2	" " 16 "	26	7 1/2
24 " " " " " " " "	42	7 1/2	" " 15 "	25	7 1/2
23 " " " " " " " "	41 1/2	7 1/2	" " 14 "	24	7 1/2
22 " " " " " " " "	41	7 1/2	" " 13 "	23	7 1/2
21 " " " " " " " "	40 1/2	7 1/2	" " 12 "	22	7 1/2
20 " " " " " " " "	40	7 1/2	" " 11 "	21	7 1/2
19 " " " " " " " "	39 1/2	7 1/2	" " 10 "	20	7 1/2
18 " " " " " " " "	39	7 1/2	" " 9 "	19	7 1/2
17 " " " " " " " "	38 1/2	7 1/2	" " 8 "	18	7 1/2
16 " " " " " " " "	38	7 1/2	" " 7 "	17	7 1/2
15 " " " " " " " "	37 1/2	7 1/2	" " 6 "	16	7 1/2
14 " " " " " " " "	37	7 1/2	" " 5 "	15	7 1/2
13 " " " " " " " "	36 1/2	7 1/2	20 Payment Endowment, 50 Years or more	40	7 1/2
12 " " " " " " " "	36	7 1/2	20 " " 45-49 Years	39	7 1/2
11 " " " " " " " "	35 1/2	7 1/2	20 " " 40-44 "	38	7 1/2
10 " " " " " " " "	35	7 1/2	20 " " 35-39 "	37	7 1/2
9 " " " " " " " "	34 1/2	7 1/2	20 " " 31-34 "	36	7 1/2
8 " " " " " " " "	34	7 1/2	20 " " 30 Years	35	7 1/2
7 " " " " " " " "	33 1/2	7 1/2	20 " " 29 Years or less	30	7 1/2
6 " " " " " " " "	33	7 1/2	15 Payment Endowment, 25 Years or more	28	5
5 " " " " " " " "	32 1/2	7 1/2	10 Payment Endowment, 20 Years or more	20	5
Single Ordinary Endowment, 50 Years or more	50	7 1/2	Single Payment Endowment, 10 Years or more	5	None
" " 49 "	49 1/2	7 1/2	" " 9 "	4 1/2	None
" " 48 "	49	7 1/2	" " 8 "	4	None
" " 47 "	48 1/2	7 1/2	" " 7 "	3 1/2	None
" " 46 "	48	7 1/2	" " 6 "	3	None
" " 45 "	47 1/2	7 1/2	" " 5 "	2 1/2	None
" " 44 "	47	7 1/2	5 Year Term	30	6
" " 43 "	46 1/2	7 1/2			
" " 42 "	46	7 1/2			
" " 41 "	45 1/2	7 1/2			
" " 40 "	45	7 1/2			
" " 39 "	44 1/2	7 1/2			
" " 38 "	44	7 1/2			
" " 37 "	43 1/2	7 1/2			
" " 36 "	43	7 1/2			
" " 35 "	42 1/2	7 1/2			
" " 34 "	42	7 1/2			
" " 33 "	41 1/2	7 1/2			
" " 32 "	41	7 1/2			
" " 31 "	40 1/2	7 1/2			
" " 30 "	40	7 1/2			
" " 29 "	39 1/2	7 1/2			
" " 28 "	39	7 1/2			
" " 27 "	38 1/2	7 1/2			
" " 26 "	38	7 1/2			
" " 25 "	37 1/2	7 1/2			
" " 24 "	37	7 1/2			
" " 23 "	36 1/2	7 1/2			
" " 22 "	36	7 1/2			
" " 21 "	35 1/2	7 1/2			
" " 20 "	35	7 1/2			
" " 19 "	34 1/2	7 1/2			
" " 18 "	34	7 1/2			
" " 17 "	33 1/2	7 1/2			
" " 16 "	33	7 1/2			
" " 15 "	32 1/2	7 1/2			
" " 14 "	32	7 1/2			
" " 13 "	31 1/2	7 1/2			
" " 12 "	31	7 1/2			
" " 11 "	30 1/2	7 1/2			
" " 10 "	30	7 1/2			
" " 9 "	29 1/2	7 1/2			
" " 8 "	29	7 1/2			
" " 7 "	28 1/2	7 1/2			
" " 6 "	28	7 1/2			
" " 5 "	27 1/2	7 1/2			
" " 4 "	27	7 1/2			
" " 3 "	26 1/2	7 1/2			
" " 2 "	26	7 1/2			
" " 1 "	25 1/2	7 1/2			
" " 0 "	25	7 1/2			

INSURANCE WITH INCOME

AGE OF INSURED AT ISSUE	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55						
INCOME AT AGE 50																																																				
% FIRST YEAR														9	38	37	36	35	34	33	32	31	30	29	28	27	26	25	23	21	19	17	15																			
% RENEWAL														71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71
INCOME AT AGE 55																																																				
% FIRST YEAR														10	39	38	37	36	35	34	33	32	31	30	30	30	30	30	29	28	27	26	25	23	21	19	17	15														
% RENEWAL														71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	
INCOME AT AGE 60																																																				
% FIRST YEAR														10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	
% RENEWAL														71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	
INCOME AT AGE 65																																																				
% FIRST YEAR														10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10		
% RENEWAL														71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	71	

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and including the fifteenth policy year. The said General Agent shall be entitled to receive during the continuance of this contract renewal commissions, reckoned at five per cent., for the eleventh to the fifteenth years of insurance, both inclusive, as the premiums for 11th to 15th year are collected and paid over as set forth in this contract; and in case of the termination of this contract ~~after the eleventh year from the date on which it was taken effect but not otherwise~~ the said General Agent will be entitled to receive on said business, as the premiums thereon are collected and paid over as set forth in this contract, renewal commissions, reckoned at two and one-half per cent., for such of said years of insurance for which said General Agent may at the time of such termination have received no renewal commissions. Said General Agent may, however, at any time after this contract has been in force one full year, elect to commute the renewal commissions referred to in this section according to the rules and regulations of said Company then in force.

That said General Agent shall, during the pleasure of said Company, but in no event beyond the duration of this contract, be entitled to receive a commission of two per cent. on premiums collected through his agency on business effected by him and his agents during the continuance of this contract in which his renewal commission interest as elsewhere defined in this contract has fully expired; and that on any policy hereafter transferred by said Company from another agency, the said General Agent shall, after the vested interest of the original General Agent has expired, and during the pleasure of the Company, be entitled to a collection fee of two per cent. of the premium.

§ 8. That on all business secured under this contract, except annuities of any kind, the said General Agent shall be entitled to receive during the continuance of this contract renewal commissions, reckoned at five per cent., for the eleventh to the fifteenth years of insurance, both inclusive, as the premiums for 11th to 15th year are collected and paid over as set forth in this contract; and in case of the termination of this contract ~~after the eleventh year from the date on which it was taken effect but not otherwise~~ the said General Agent will be entitled to receive on said business, as the premiums thereon are collected and paid over as set forth in this contract, renewal commissions, reckoned at two and one-half per cent., for such of said years of insurance for which said General Agent may at the time of such termination have received no renewal commissions. Said General Agent may, however, at any time after this contract has been in force one full year, elect to commute the renewal commissions referred to in this section according to the rules and regulations of said Company then in force.

§ 9. That said General Agent shall, during the pleasure of said Company, but in no event beyond the duration of this contract, be entitled to receive a commission of two per cent. on premiums collected through his agency on business effected by him and his agents during the continuance of this contract in which his renewal commission interest as elsewhere defined in this contract has fully expired; and that on any policy hereafter transferred by said Company from another agency, the said General Agent shall, after the vested interest of the original General Agent has expired, and during the pleasure of the Company, be entitled to a collection fee of two per cent. of the premium.

9a.

That said Company will pay the rent of a suitable office and furnish the necessary clerk hire and telephone service.

missions Accrue Refunding Commission

on which such commissions are to be reckoned, are collected and paid over as herein provided; and such commissions shall accrue only as the premiums be in full compensation for any and all services rendered or to be rendered by said General Agent under this contract.

§ 11. That should the said Company refund any premium on any policy issued on an application secured by said General Agent or by agents in his employ, then said General Agent shall on demand repay said Company the commission received on such premium.

Commissions on Changed Policies

§ 12. That, except as hereinafter provided, when a policy is changed from one kind to another no adjustment will be made of commissions on premiums paid or on premiums which might have been paid on the original policy prior to the date of such change; and said General Agent will not be called upon to refund any of the commissions already paid to him on such premiums; but such a change, when effected in a policy issued upon an application secured by another agent, shall not entitle said General Agent to commissions on premiums paid on the substituted policy after such change has been made; nor shall such a change operate to deprive the agent who secured the application for the original policy of any commissions on premiums collected after such change to which he would have been entitled had such change not been made, unless such change shall effect a reduction in the annual premium or in the rate of renewal commissions; provided, however, that when a Term policy already in force is changed in accordance with the rules of said Company by payment of difference in premiums, and a policy of a different kind bearing the same number and date is substituted in place thereof, an adjustment of the commissions will be made in accordance with the rules and regulations of said Company then in force.

Changes in Rates of Commissions, etc.

§ 13. That said Company reserves the right to change, without otherwise affecting this contract, any or all of the rates of commissions set forth in Section 4 of this contract; also to change the number of renewal commissions to which said General Agent may be entitled under this contract whenever the same may become necessary or expedient by reason of legislation or the requirements of any insurance department; but said Company shall give said General Agent sixty days' notice of its intention to make any such change, except that when the number of renewal commissions is to be changed because of such legislation or requirements, a shorter notice may be given if necessary to enable said Company to comply with the provisions of such legislation or requirements. It is agreed, however, that any change in the rates of commissions or number of renewal commissions shall apply only to new business which may be done after the date when such change shall become effective.

Indebtedness Assignment

§ 14. That said Company may offset against commissions due said General Agent from said Company at any time, any debt or debts due, or which may become due, from said General Agent to said Company; and any attempted assignment of this contract or of any of the claims or rights accrued or to accrue hereunder, by the said General Agent, shall be void unless assented to in writing by said Company.

Commission Reservation

§ 15. That during the pleasure of said Company, but in no event beyond the duration of this contract, the said General Agent shall be entitled to receive first year's and renewal commissions on the premiums on any policy issued by said Company insuring his life.

Delivery of Policies

§ 16. That said General Agent shall not deliver, nor authorize any one to deliver, any policy issued by said Company except upon payment of the premium required by such policy, according to the rules of the Company, during the lifetime and good health of the person proposed for insurance.

Deposits Reporting

§ 17. That said General Agent shall be responsible to said Company for all moneys due to it for premiums or otherwise received by him or his employees, or by agents appointed by him, and shall upon receipt thereof, unless otherwise instructed by said Company, deposit the same to the credit of said Company in a bank to be designated by said Company; and said General Agent shall follow the requirements and instructions of said Company in making record of, accounting for, and reporting all moneys received, and in returning premium receipts and undelivered policies.

Limitation of Authority

§ 18. That said General Agent shall have no authority under this contract to make, alter, or discharge any policy or contract of insurance; to accept or refuse to write for forfeiture; to extend the time for paying a premium; to bind said Company to make a loan of any kind upon a policy; to fix any extra premium for hazardous risks; to alter or amend any papers sent to him by said Company; to bind said Company by making any promise, or by accepting any representation or information not contained in an application for insurance; and that he shall not collect or receive at any time any premium or installment of premium not due by the terms of the policy, unless he has at the time in his possession, for delivery to the insured, the official receipt of the Company representing such premium; and that he shall not accept a partial payment of any premium or installment of premium; nor shall he accept any past-due premium except in accordance with the rules and instructions of said Company.

Records and Examinations

§ 19. That all books, cards, registers, policies, premium receipts, documents and other papers, connected with the business of said Company, in charge of said General Agent, shall be its property, and shall at any and all times be open and freely exhibited for the purpose of examination by its officers or other duly authorized representative, and at the termination of this contract shall, together with all other property in his possession belonging to said Company, be delivered to it, or to its representative authorized to receive the same.

Postage and Expenditures

§ 20. That said Company will pay the necessary postage incident to the business of the agency of said General Agent, reserving the right to discontinue altogether or to reduce the amount of such payment at any time; it will furnish said General Agent such supplies as it shall deem necessary, but will not be liable to pay any other charges, unless the same shall have been previously authorized in writing by said Company. Vouchers for all expenditures, including postage, shall be furnished by said General Agent, and shall accompany the report in which the charges appear.

Definitions

§ 21. That it is understood that the expressions "First Year's Premiums" and "Renewal Premiums" when used, in this contract have reference to premiums for the first year of insurance, and for the second and subsequent years of insurance respectively; and that the expressions "First Year's Commissions" and "Renewal Commissions" refer to commissions on first year's premiums and renewal premiums respectively; and that the word "Business" except when manifestly used in another sense refers to insurance.

Forbearance Not a Waiver

§ 22. That no act of forbearance or failure to insist upon the prompt compliance by said General Agent with any of the provisions of this contract, either express or implied, shall be construed as a waiver by said Company of any of its rights hereunder.

Bond

§ 23. That a bond satisfactory to said Company, issued by a corporation authorized to issue bonds of suretyship in the State of Massachusetts, shall be furnished to said Company forthwith by said General Agent.

Contract takes Effect

§ 24. That this contract shall take effect on the _____ day of July, 19____, and shall, on that date, annul all previous contracts between the parties hereto. This contract may be terminated at any time by written notice by said Company or by said General Agent, subject to the right of said General Agent to any commissions to which he may be entitled by the provisions of this contract. In serving any notice upon, or giving any instructions hereunder to, said General Agent, the personal delivery or the posting of a letter containing such notice or such instructions addressed to said General Agent at his usual or last-known post office address, shall be deemed sufficient, and the affidavit or certification of the mailing or personal delivery of such a notice by the person mailing or delivering the same shall be competent evidence of such mailing or delivery.

Termination

In Witness Whereof, The parties to this contract have subscribed the same in duplicate, the day and year first above written.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

By _____
 Second Vice President

ONLY COPY AVAILABLE

CONTRACT

..... Laurence E. Simon

General Agent.

..... New York, New York

Dated July 1, 19 32


In Effect July 1, 19 32

ONLY COPY AVAILABLE

23a

24a

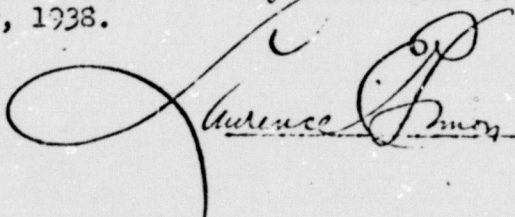
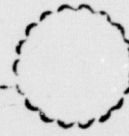
**Exhibit B, Assignment and Consent Executed by
Lawrence E. Simon, dated November 10, 1938.**

(See opposite )

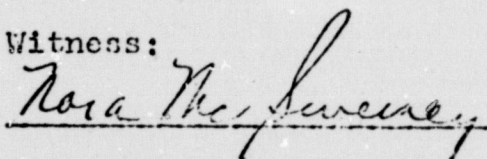
For Value Received, I hereby sell, assign and transfer to the Third National Bank and Trust Company of Springfield, Massachusetts, all my right, title and interest in and to any and all renewal commissions which may hereafter become due and payable to me under my contract with the Massachusetts Mutual Life Insurance Company, dated July 12, 1932. This assignment is made and given unto said bank as security upon any and all of my present or future indebtedness unto said bank.

IT IS AGREED, however, that said bank shall not be entitled to collect or receive said commissions until default has been made in the payment of the foregoing indebtedness, or a part thereof, and it is further agreed that said Massachusetts Mutual Life Insurance Company may continue to pay to the said assignor said commissions until default has been made in the payment of said indebtedness and notice in writing of said default has been given said Massachusetts Mutual Life Insurance Company and Lawrence E. Simon, 20 Pine Street, New York City, by said bank. In which event said bank is hereby authorized to collect said commissions until the whole of the indebtedness as aforesaid shall have been paid, whereupon, this assignment shall become void. It is further agreed, that this assignment is subject to all the terms and conditions of said contract with the Massachusetts Mutual Life Insurance Company and that such evidence shall be furnished said Massachusetts Mutual Life Insurance Company as they may require as to the payment of aforesaid indebtedness.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this tenth day of November, 1938.

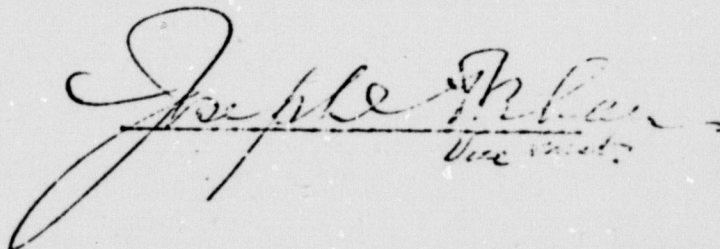
 

Witness:

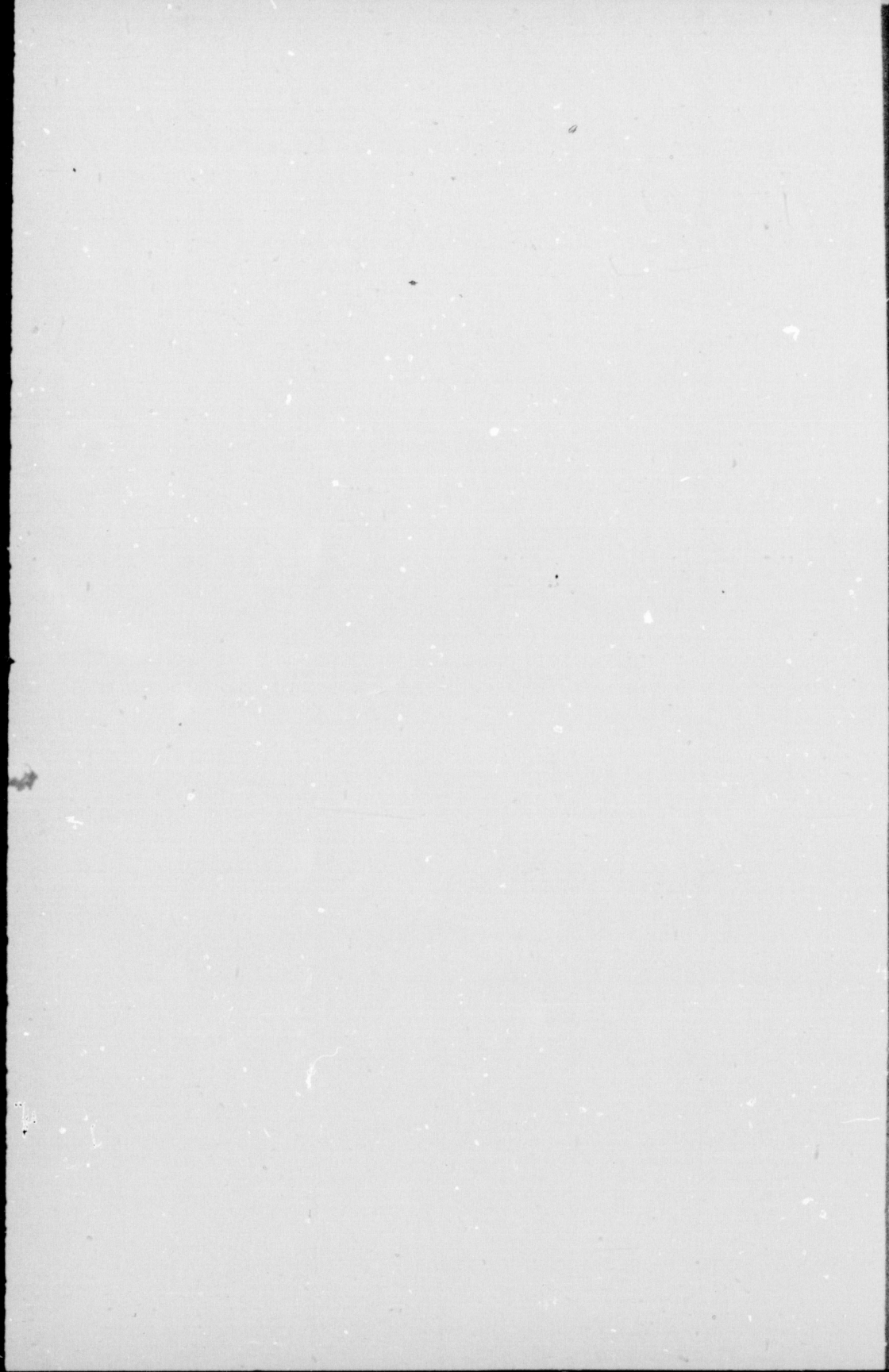


Springfield, Massachusetts,

The MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY hereby assents to the foregoing assignment, reserving, however, all their rights under said contract.



J. M. McKee

a facsimile copy



25a

Exhibit C, Contract Between Massachusetts Life Insurance Company and Lawrence E. Simon, dated September 16, 1964.

(See opposite )

The Massachusetts Mutual Life Insurance Company, of Springfield, Massachusetts, hereinafter referred to as "Company", and Lawrence E. Simon, of New York, New York, hereinafter referred to as "General Agent", in consideration of the mutual covenants herein contained, do hereby agree as follows:

1. The following words and terms as used in this Agreement shall have the meaning set forth below:

- (a) Contract: the Contract between the Company and the General Agent effective July 1, 1932.
- (b) General Agent's Commissions: the difference between the renewal commissions for the second to the tenth policy years, inclusive, which the General Agent receives under the Contract and the amounts which are payable to agents under the terms and conditions of their contracts and agreements with the General Agent. Such General Agent's Commissions shall not include commissions for the eleventh to the fifteenth years of insurance, both inclusive, or any commutation thereof, nor commissions on Group plans.
- (c) Report Month: the period beginning with the day following the date of closing of the final report for the New York-Copeland Agency for each month and ending with the date of closing of the final report for that Agency for the next succeeding month.

2. If, after the termination of the Contract and during the lifetime of the General Agent, the amount of the General Agent's Commissions during the twelve report month period immediately preceding any anniversary of the date of such termination shall be less than twenty-seven thousand eight hundred eighty-eight dollars (\$27,888), the Company will pay to the General Agent on the first day of the next succeeding calendar month (hereinafter referred to as "Commencement Date") the difference between such amounts; and the Company will pay to the General Agent the sum of two thousand three hundred twenty-four dollars (\$2,324) on the Commencement Date and on the first day of each month thereafter during the continuance of this Agreement, provided, however, that:

- (a) The Company shall receive from the General Agent a valid assignment of all of his right, title and interest in and to his General Agent's Commissions free from all liens, assignments or encumbrances of any kind whatsoever; and
- (b) The General Agent shall not engage in the business of life insurance for any other life insurance company in the United States or Canada or engage in any activities which in the sole judgment of the Company are deemed to be detrimental to its best interest.

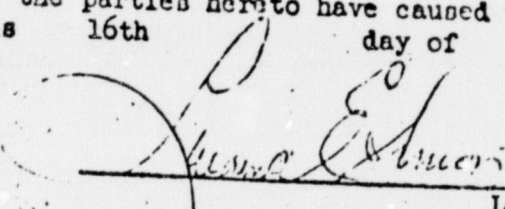
3. If the General Agent shall be unable to comply with the provisions of Paragraph 2(a) on the Commencement Date, the Company, except as hereinafter provided, will pay to the General Agent on that date and annually thereafter during the continuance of this Agreement, the difference between twenty-seven thousand eight hundred eighty-eight dollars (\$27,888) and the General Agent's Commissions for the preceding completed twelve report months. If the General Agent as of any anniversary of the Commencement Date shall comply with the provisions of Paragraph 2(a), the Company will pay to the General Agent on such anniversary date the difference between twenty-seven thousand eight hundred eighty-eight dollars (\$27,888) and the General Agent's Commissions for the preceding twelve report month period and on that date the Company will commence monthly payments as provided in Paragraph 2.

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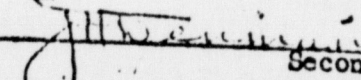
-2-

4. On and after the commencement of monthly payments hereunder all General Agent's Commissions thereafter payable under the Contract shall be received by and become the absolute property of the Company. Commuted renewal commissions, commissions for the eleventh to the fifteenth years of insurance, both inclusive, and commissions on Group plans shall be payable to the General Agent under the terms of the Contract.
5. This Agreement shall terminate on:
 - (a) the death of the General Agent; or
 - (b) violation by the General Agent of the provisions of Paragraph 2(b); or
 - (c) revocation by the Company as of any anniversary of the date of termination of the Contract.
6. If this Agreement shall terminate for any reason, the liability of the Company for payments hereunder shall cease and the Company shall not be liable for any further payments under this Agreement except as provided in Paragraph 7, and the Company will release its right to any further commissions arising by reason of any assignment under Paragraph 2(a), reserving, however, all of its rights under the Contract.
7. In the event of the termination of this Agreement after the Commencement Date, the Company will make a pro rata adjustment for the period which shall have elapsed from the date of the last previous payment under this Agreement to the date of termination.
8. No provision of this Agreement shall in any way alter, amend or modify the right of the Company under the Contract to apply commissions payable under the Contract on account of any obligations of the General Agent to the Company.
9. In consideration of this Agreement, the General Agent agrees that he shall not be entitled to participate in or receive any benefits under the so-called Field Assistant Plan of the Company.
10. The General Agent shall execute such other instrument or instruments as the Company may request in order to perfect the right, title and interest of the Company hereunder and to enable the Company to exercise its rights or carry out its obligations hereunder.
11. This instrument includes the entire Agreement between the parties. This Agreement shall not be modified or amended except by a writing signed by both parties.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed in duplicate this 16th day of September, 1964.


Lawrence E. Simon

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY

By 
Second Vice President

27a

**Answer and Statement of Claim of Defendant Third
National Bank of Hampden County.**

Defendant, Third National Bank of Hampden County, by its attorneys Bleakley, Platt, Schmidt, Hart & Fritz, for its answer to the complaint herein, alleges as follows upon information and belief:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 5 inclusive, 7 through 13 inclusive, 16 through 20 inclusive, 24 through 34 inclusive except admits so much of paragraph 2 which alleges that the defendant Third National Bank of Hampden County is a national banking association with its principal place of business in Springfield, Massachusetts.

2. In answer to paragraph 22 denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein except admits that commencing on March 29, 1967, plaintiff made payments to defendant Third National Bank of Hampden County, pursuant to the terms of Exhibit "B" until on or about January 4, 1968.

3. In answer to paragraph 23, denied knowledge or information sufficient to form a belief as to the truth of the allegations contained therein except that admits that as of January 4, 1968, Lawrence E. Simon was indebted to defendant Third National Bank of Hampden County in the amount of \$132,055.20, plus interest, and that plaintiff has made no payments of renewal commissions to defendant Third National since on or about January 4, 1968.

*Answer and Statement of Claim of Defendant Third
National Bank of Hampden County.*

AS AND FOR A CLAIM TO THE FUNDS WHICH ARE THE SUBJECT
MATTER OF THIS ACTION, DEFENDANT THIRD NATIONAL
BANK OF HAMPDEN COUNTY ALLEGES ON INFORMATION
AND BELIEF AS FOLLOWS:

4. On or about November 10, 1938, defendant Lawrence E. Simon executed a document by which he assigned as collateral and transferred to the Third National Bank of Hampden County all his right, title and interest in and to all renewal commissions thereafter becoming due and payable to him under the contract designated Exhibit "A" annexed to the complaint and the plaintiff executed said contract showing its consent to the assignment. A true copy of said assignment and consent, marked Exhibit "B", is annexed to the complaint.

5. Prior to March 29, 1967 defendant Lawrence E. Simon defaulted in making the payments to defendant Third National Bank of Hampden County of the indebtedness mentioned in Exhibit "B" annexed to the complaint and Third National gave due notice of said default to plaintiff and defendant Simon.

6. Commencing in March 29, 1967 plaintiff made payments to the Third National Bank of Hampden County, pursuant to the terms of Exhibit "B" annexed to the complaint until on or about January 4, 1968.

7. On or about and between February 20, 1970 and March 11, 1970, defendant Third National Bank of Hampden County caused to be filed Financing Statements pur-

*Answer and Statement of Claim of Defendant Third
National Bank of Hampden County.*

suant to the Uniform Commercial Code in the Registrar's office, New York County, and in the Office of the Secretary of State of the State of New York.

8. On or about and between said dates, the defendant Third National Bank of Hampden County also caused to be filed Financing Statements in the appropriate offices in the State of Massachusetts.

9. Defendant Third National Bank of Hampden County has a prior right in and to the funds deposited in this Court and to be deposited in this Court by the plaintiff to the extent of \$152,590.49 plus interest at a per diem rate of \$24.16 since May 6th, 1970, which said right is paramount and superior to the rights of any and all of the other defendants herein.

IN ANSWER TO THE CROSS CLAIM OF DEFENDANTS ROYAL S. MARKS, SAMUEL HADDAD AND NATALIE M. HADDAD, DEFENDANT THIRD NATIONAL BANK OF HAMPDEN COUNTY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

10. Denies the truth of the allegations contained in paragraphs "Fourth" and "Seventh" of the aforesaid cross claim.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "Fifth" and "Sixth" contained in the aforesaid cross claim.

*Answer and Statement of Claim of Defendant Third
National Bank of Hampden County.*

AS AND FOR ITS ANSWER TO THE CLAIM OF DEFENDANT DASHA AUERBACH STUART, EXECUTRIX UNDER LAST WILL AND TESTAMENT OF JOSEF AUERBACH, DEFENDANT THIRD NATIONAL BANK OF HAMPDEN COUNTY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "Fourth," "Fifth," "Sixth" and "Seventh" of said claim.

13. Denies the allegations contained in paragraph "Eighth" of said claim.

AS AND FOR ITS ANSWER TO THE STATEMENT OF CLAIM OF DEFENDANTS ROYAL S. MARKS, SAMUEL HADDAD AND NATALIE M. HADDAD, DEFENDANT THIRD NATIONAL BANK OF HAMPDEN COUNTY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "First," "Second" and "Third" of said statement of claim.

AS AND FOR ITS ANSWER TO THE PROOF OF CLAIM OF DEFENDANT IRVING GELST, DEFENDANT THIRD NATIONAL BANK OF HAMPDEN COUNTY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "First" and "Second" of said proof of claim.

*Answer and Statement of Claim of Defendant Third
National Bank of Hampden County.*

16. Denies the allegations contained in paragraph "Third" of said proof of claim.

AS AND FOR ITS ANSWER TO THE ALLEGED "AFFIRMATIVE DEFENSE" OF DEFENDANT STERLING NATIONAL BANK & TRUST COMPANY, DEFENDANT THIRD NATIONAL BANK OF HAMPDEN COUNTY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

17. Denies the allegations contained in paragraphs "Second" through "Fifth" inclusive of said alleged "affirmative defense."

AS AND FOR ITS ANSWER TO THE CLAIM OF DEFENDANT NATIONAL BANK OF NORTH AMERICA, DEFENDANT THIRD NATIONAL BANK OF HAMPDEN COUNTY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 of said claim.

19. Denies the allegations contained in paragraph 4 of said claim.

AS AND FOR ITS ANSWER TO THE STATEMENT OF CLAIM OF DEFENDANT NATIONAL BANK OF NORTH AMERICA, DEFENDANT THIRD NATIONAL BANK OF HAMPDEN COUNTY ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2 and 3 of said Statement of Claim.

*Answer and Statement of Claim of Defendant Third
National Bank of Hampden County.*

21. Denies the allegations contained in paragraph 4 of said Statement of Claim.

WHEREFORE, defendant Third National Bank of Hampden County demands that it be paid, from the funds deposited and to be deposited with this Court, the sum of \$152,590.49, plus interest at a per diem rate of \$24.16 since May 6th, 1970, and for such other and further relief as to the Court may seem just and proper in the circumstances.

BLEAKLEY, PLATT, SCHMIDT, HART & FRITZ

By: THOMAS C. PLATT
A Member of the Firm
Attorneys for Defendant,
Third National Bank of Hampden County
Office & P. O. Address
120 Broadway
New York, New York 10005
REctor 2-2000

**Answer and Statement of Claim of Defendant
Lawrence E. Simon.**

Defendant Lawrence E. Simon, as and for his Answer to the Complaint of Plaintiff Massachusetts Mutual Life Insurance Company and to the Statements of Claim and Proofs of Claim filed by the other Defendants herein and as and for his Statement of Claim, by his attorneys, LoFrisco Gallagher & Kenny, respectfully alleges:

AS AND FOR HIS ANSWER TO THE COMPLAINT OF PLAINTIFF
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY

1. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 24, 25, 26 and 27 of said Complaint.
2. Denies each and every allegation set forth in paragraph 15 of said Complaint except admits that on or about November 10, 1938 Defendant Lawrence E. Simon (hereafter "Simon") executed a document in form annexed to said Complaint as Exhibit "B" and that Plaintiff Massachusetts Mutual Life Insurance Company (hereafter "Mutual") executed said document and respectfully refers to said document for its contents.
3. Admits the allegations of paragraphs 18 and 19 of said Complaint respecting the execution by Simon of contracts with each of H. C. Copeland & Company, Inc., a general agent of Mutual, and with Desmond J. Lizotte, a general agent of Mutual, and denies knowledge or information sufficient to form a belief respecting the dates of said contracts.
4. Denies each and every allegation set forth in paragraph 20 of said Complaint, except admits that Mutual made payments to Simon subsequent to the execution of

*Answer and Statement of Claim of Defendant
Lawrence E. Simon.*

the document therein referred to and that payments ceased on or about March 29, 1967.

5. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph 22 of said Complaint, except admits, upon information and belief, that Mutual made payments to Defendant Third National Bank of Hampden County (hereafter "Third National") from and after on or about March 29, 1967.

6. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph 23 of said Complaint, except admits that no payment of renewal commissions have been made to Simon by Mutual since a date prior to January 4, 1968.

AS AND FOR AN ANSWER TO THE STATEMENT OF CLAIM OF
DEFENDANT THIRD NATIONAL

7. Denies each and every allegation set forth in paragraph 4 of said Claim, except admits that on or about November 10, 1938 Simon executed a document in form annexed to said Complaint as Exhibit "B" and that Mutual executed said document and respectfully refers to said document for its contents.

8. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph 6 of said Claim, except admits, upon information and belief, that Mutual made payments to Third National from and after on or about March 29, 1967.

9. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs 7 and 8 of said Claim.

*Answer and Statement of Claim of Defendant
Lawrence E. Simon.*

10. Denies each and every allegation set forth in paragraph 9 of said Claim.

AS AND FOR AN ANSWER TO THE PROOF OF CLAIM AND THE
AFFIRMATIVE DEFENSES OF DEFENDANT STERLING NATIONAL
BANK & TRUST COMPANY OF NEW YORK

11. Denies each and every allegation set forth in said Claim, except admits that judgments were entered on behalf of Defendant Sterling National Bank & Trust Company of New York (hereafter "Sterling") in form annexed to said Claim as Exhibit "A" and respectfully refers to said documents for their contents.

AS AND FOR AN ANSWER TO THE STATEMENT OF CLAIM OF
DEFENDANT NATIONAL BANK OF NORTH AMERICA

12. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs 1, 2 and 3 of said Claim, except admits that a judgment was entered on behalf of Defendant National Bank of North America in form annexed to said Claim as Exhibit "A" and respectfully refers to said document for its contents.

13. Denies each and every allegation set forth in paragraph 4 of said Claim.

AS AND FOR AN ANSWER TO THE PROOF OF CLAIM OF DEFENDANT
DASHA AUERBACH STUART, EXECUTRIX UNDER THE LAST WILL
AND TESTAMENT OF JOSEF AUERBACH

14. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs Fourth, Fifth, Sixth and Seventh of said Claim, except admits that a complaint was filed, a judgment

*Answer and Statement of Claim of Defendant
Lawrence E. Simon.*

was entered and docketed by Josef Auerbach and an order of the Supreme Court of the State of New York, County of New York, was entered in form annexed to said Claim as Exhibits "A", "B", "C" and "D" and respectfully refers to said documents for their contents.

15. Denies each and every allegation set forth in paragraph Eighth of said Claim, except admits, upon information and belief, so much of said paragraph as alleges that the Estate of Josef Auerbach, and in particular Dasha Auerbach Stuart, Executrix under the Last Will and Testament of Josef Auerbach, deceased, is successor in interest to the rights, if any, of Josef Auerbach in the premises.

AS AND FOR AN ANSWER TO THE STATEMENT OF CLAIM OF
IRVING GEIST

16. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs Third and Fourth of said Claim, except admits that a judgment was filed, entered and docketed in favor of Defendant Irving Geist and Simon was served with a subpoena in form annexed to said Claim as Exhibits "A" and "B" and respectfully refers to said documents for their contents.

17. Denies each and every allegation as set forth in paragraph Fifth of said Claim.

AS AND FOR AN ANSWER TO THE PROOF OF CLAIM OF DEFENDANTS
ROYAL S. MARKS, SAMUEL G. HADDAD AND NATALIE HADDAD

18. Denies each and every allegation set forth in paragraph Second of said Claim, except admits that a judgment was rendered against Simon in form annexed to said Claim as Exhibit "A".

*Answer and Statement of Claim of Defendant
Lawrence E. Simon.*

AS AND FOR A FIRST SEPARATE DEFENSE TO ALL OF THE CLAIMS
ASSERTED BY ALL THE DEFENDANTS AND TO THE COMPLAINT

19. Upon information and belief, under and pursuant to the laws of the State of New York and of the United States, the sums deposited into the registry of this Court and such further sums due from Mutual to Simon under and pursuant to the agreements in form annexed as Exhibit A and C to the Complaint are exempted from the claims of all of the Defendants in this action and from each of them in that, among other things, more particularly said sums are in part the proceeds of a pension or retirement fund and the balance are wages payable by Mutual to Simon.

AS AND FOR A SECOND SEPARATE DEFENSE TO ALL OF THE CLAIMS
ASSERTED BY ALL THE DEFENDANTS AND TO THE COMPLAINT

20. Heretofore a petition in Bankruptcy was filed and is presently pending in respect of Simon in the Federal District Court for the Southern District of New York, No. 70-B-588, in which a Trustee was appointed for and on behalf of the Estate in Bankruptcy.

21. Upon information and belief, said Trustee in Bankruptcy claims an interest relating to the subject of this action and is so situated that the disposition of the action in his absence may impair or impede his ability to protect that interest or may leave the parties in this action subject to otherwise inconsistent obligations by reason of his claimed interest.

AS AND FOR A THIRD SEPARATE DEFENSE TO THE CLAIM OF DEFENDANT THIRD NATIONAL AND TO THE COMPLAINT AND AS
AND FOR A CROSS-CLAIM AGAINST PLAINTIFF MUTUAL AND DEFENDANT THIRD NATIONAL

22. Upon information and belief, the alleged assignment under and pursuant to the terms of the document annexed

*Answer and Statement of Claim of Defendant
Lawrence E. Simon.*

as Exhibit B to said Complaint was at all times heretofore and still is illegal and void for the reason that said document was and is an assignment of future earnings in violation of the laws of the State of New York.

23. By reason of the foregoing, all payments made by Mutual to Third National under or pursuant to the terms of said document were illegal and resulted in damage to Simon in the amount thereof.

WHEREFORE, Defendant Lawrence E. Simon demands judgment that the Complaint of Plaintiff and the Claims asserted by all other Defendants be dismissed and that Defendant Lawrence E. Simon be paid all funds now and hereafter deposited with this Court in the premises and further that Defendant Lawrence E. Simon recover of Plaintiff Massachusetts Mutual Life Insurance Company and of Defendant Third National Bank of Hampden County judgment in an amount equal to all payments heretofore made by said Plaintiff to said Defendant under and pursuant to the alleged assignment referred to in the aforesaid Cross-Claim, together with accrued interest thereon, costs and disbursements herein and such other, further or different relief as to this Court may seem just and proper.

LOFRISCO GALLAGHER & KENNY

By PETER P. KENNY

Peter P. Kenny, A Member
of the Firm

Attorneys for Defendant

Lawrence E. Simon

Answer of Defendant Dasha Auerbach Stuart.

Defendant, Dasha Auerbach Stuart, Executrix under the last will and testament of Josef Auerbach, by her attorneys Otterbourg, Steindler, Houston & Rosen for her answer to the complaint herein respectfully alleges:

FIRST: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "1", "2", "4 through 11" inclusive, "14 through 23" inclusive and "25 through 28" inclusive.

SECOND: Denies each and every allegation contained in paragraph "24" of the complaint except admits so much of paragraph "24" of the complaint as alleges that, pursuant to the Statutes of the State of New York in such cases made and provided and in January 1968 the Sheriff of the City of New York, New York County Division made a levy, pursuant to an execution delivered to him under a judgment in favor of Josef Auerbach, plaintiff against Pension Corporation of America and Lawrence Simon, defendants, which said judgment was entered in the United States District Court for the Southern District of New York on December 27, 1967 (judgment No. 69,028-67 Civil Action No. 1689) which said judgment, on January 9, 1968, was docketed with the Clerk of the Supreme Court and County of New York, all as more fully hereinafter set forth and all as more fully appears from the Public Records of said Court and Sheriff.

THIRD: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "29" of the complaint, except admits that an involuntary petition in bankruptcy was filed against Lawrence Simon and that said petition was dismissed.

AS AND FOR A CLAIM TO THE FUNDS WHICH ARE THE
SUBJECT MATTER OF THIS ACTION

FOURTH: Heretofore, and in or about April 28, 1967, Josef Auerbach filed a complaint (Exhibit A) in this Court

Answer of Defendant Dasha Auerbach Stuart.

against Pension Corporation of America and Lawrence Simon (67-Civil Action No. 1689) and on or about December 27, 1967, in the said action, a judgment of this Court (No. 69,028) was rendered in favor of Josef Auerbach as plaintiff against Pension Corporation of America and Lawrence Simon as defendants, which said judgment (Exhibit B) stated in relevant part as follows:

"ORDERED, adjudged and decreed that plaintiff recover of defendants, jointly and severally, the sum of \$68,000.00 with interest at the rate of 6% per annum from April 1, 1967 in the sum of \$3,000.00, making a total of \$71,000.00."

FIFTH: On January 9, 1968, said judgment was docketed with the Office of the Clerk of the Supreme Court and County of New York and a transcript issued (Exhibit C).

SIXTH: Immediately upon the filing of the judgment with the Clerk of the Supreme Court and County of New York as aforesaid and in accordance with the Statutes of the State of New York in such cases made and provided (and, in particular, pursuant to Article 52 CPLR), there were delivered to the Sheriff of the City of New York, New York County Division, executions pursuant to the judgment aforementioned and, upon information and belief, the said Sheriff made levies upon various garnishees, including the plaintiff in this action.

SEVENTH: From time to time thereafter, applications were made to the Supreme Court of the State of New York, County of New York on behalf of Josef Auerbach as judgment-creditor of Pension Corporation of America and Lawrence Simon for orders extending the effective date of the levies made by the Sheriff pursuant to the executions delivered to him as aforesaid, and on or about July 1, 1969 an Order of the Supreme Court of the State of New York, County of New York was entered (Exhibit D), which said

Answer of Defendant Dasha Auerbach Stuart.

Order stated in relevant part as follows:

"ORDERED that the effective date of the levies heretofore made be and each of them is hereby extended for an additional period of one year from the date of this Order and that until such time the garnishees upon whom levy was made, and each of them, is forbidden to make or suffer any sale, assignment or transfer of or any interference with any interest of the Pension Corporation of America and Lawrence Simon or pay over or otherwise dispose of any debt owed to the Pension Corporation of America and Lawrence Simon, to any person other than the Sheriff."

EIGHTH: The Estate of Josef Auerbach, and in particular Dasha Auerbach Stuart as Executrix under the last will and testament of Josef Auerbach, deceased is the successor in interest to all of the rights of Josef Auerbach in the premises and by reason of all of the foregoing this defendant (Dasha Auerbach Stuart as Executrix of Josef Auerbach, deceased) has a priority right in and to the funds deposited with this Court by the plaintiff to the extent of the full amount of the judgment, together with accrued interest, unpaid, which said right is paramount and superior to the rights of any of the other defendants named herein.

WHEREFORE, defendant demands judgment that she be paid, from the funds deposited with this Court, the full amount of the judgment together with accrued interest, unpaid, and for such other, further different relief as to the Court might seem just and proper.

OTTERBOURG, STEINDLER, HOUSTON & ROSEN

By Kurt J. Wolff

A Partner

Attorneys for Defendant Dasha Auerbach
Stuart

**Exhibit A, Complaint Filed by Josef Auerbach
Against Pension Corporation of America and
Lawrence Simon.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOSEF AUERBACH,

Plaintiff,

against

PENSION CORPORATION OF AMERICA
and LAWRENCE SIMON,

Defendants.

Plaintiff, by OTTERBOURG, STEINDLER, HOUSTON & ROSEN,
his attorneys, for his complaint alleges:

ALLEGATIONS APPLICABLE TO ALL COUNTS

FIRST: Plaintiff is and at all material times hereinafter mentioned was, a resident of the State, County and City of New York.

SECOND: Defendant PENSION CORPORATION OF AMERICA (hereinafter "CORPORATION") is and at all material times hereinafter mentioned was, a domestic corporation with an office and place of business in the State, County and City of New York.

THIRD: Upon information and belief, defendant LAWRENCE SIMON (hereinafter "SIMON") is and at all material times hereinafter mentioned was, a resident of the State, County and City of New York.

*Exhibit A. Complaint Filed by Joseph Auerbach Against
Pension Corporation of America and Lawrence Simon.*

FOURTH: This action arises under Title 15 USC § 77 et seq. and § 78 et seq., and Rule 10(B)(5) of the General Rules and Regulations promulgated by the SECURITIES & EXCHANGE COMMISSION under the Securities Exchange Act of 1934 (Title 15 USC § 78 et seq.) and this Court has jurisdiction pursuant to Title 28 USC § 1331.

FIFTH: The stock of CORPORATION is not now, nor has it ever been, registered pursuant to Title 15 USC § 77 et seq.; is not an exempt security within the meaning of Title 15 USC § 77 et seq.

SIXTH: Upon information and belief, CORPORATION was organized under the laws of the State of New York in 1940, and at all material times thereafter, SIMON owned a majority of the issued and outstanding stock of CORPORATION, controlled CORPORATION, and was President thereof.

SEVENTH: Commencing in or about May 1965, CORPORATION and SIMON, by use of the means and instrumentalities of interstate commerce and of the mails, offered to sell to plaintiff and to numerous persons, all of whose names are unknown to plaintiff at this time (hereinafter collectively referred to as "the Public"), at various locations in various states of the United States, shares of stock in CORPORATION upon the representations, among others, that:

(a) CORPORATION then had net earnings of one million dollars and would have net earnings in excess of one million dollars in 1966;

(b) CORPORATION and its principal shareholder, SIMON, were actively negotiating with underwriters for a public offering of CORPORATION's stock;

(c) Underwriters who had been approached by CORPORATION and SIMON were interested in underwriting a public offering of CORPORATION's stock; and

Exhibit A. Complaint Filed by Joseph Auerbach Against Pension Corporation of America and Lawrence Simon.

(d) Purchase by the individuals to whom the stock was then being offered would permit such individuals to obtain a substantial return on their investment because the price of which CORPORATION's stock would be sold to the public would be substantially in excess of the price at which the individuals, to whom the stock was then being offered would now pay.

EIGHTH: Plaintiff was never given any financial statement of CORPORATION's affairs and was and is without knowledge as to the truth or falsity of the representations made and was and is without any reasonable means of ascertaining the truth or falsity of such representations, and in reliance upon the truth and accuracy of such representations, plaintiff, on or about May 3, 1965, delivered to SIMON \$48,000 as and for the purchase price of three (3) shares of stock in CORPORATION.

NINTH: On or about May 3, 1965, defendants sent to plaintiff through the United States mail, a stock certificate for three (3) shares of the stock of CORPORATION.

TENTH: Thereafter, and prior to November 5, 1965, CORPORATION increased its outstanding common stock from 100 shares, no par value, to one million shares, having a par value of ten cents (.10) per share, entitling each shareholder to receive 10,000 shares for each share presently owned.

ELEVENTH: On or about November 5, 1965, defendants sent to plaintiff through the United States mail, a stock certificate for thirty thousand (30,000) shares of the ten cents par value common stock of CORPORATION, and plaintiff returned the certificate for three (3) shares previously issued and sent to him.

Exhibit A. Complaint Filed by Joseph Auerbach Against Pension Corporation of America and Lawrence Simon.

TWELFTH: Between May 1965 and May 1966, CORPORATION and SIMON, by use of the means and instrumentalities of interstate commerce and of the mails, offered to sell to the Public in various locations in various states of the United States, additional stock in CORPORATION, upon the representations, among others, that:

(a) The net earnings of CORPORATION, for the year 1966, were at a rate exceeding 1965 net earnings (as previously represented) for a comparable period of time;

(b) The public offering of stock of CORPORATION would take place shortly and no later than October 1966; and

(c) Other members of the Public had expressed interest in and were acquiring stock of CORPORATION, and plaintiff, particularly, ought to purchase more stock to secure yet a greater profit when the shortly-anticipated public offering took place.

THIRTEENTH: Plaintiff was never given any financial statement of the CORPORATION's affairs and was and still is without knowledge as to the truth or falsity of the representations made and was and still is without any reasonable means of ascertaining the truth or falsity of such representations, and in reliance upon the truth and accuracy of such representations, plaintiff, on or about and between February 28, 1966 and April 30, 1966, delivered to CORPORATION by check, some of which checks were endorsed by CORPORATION to SIMON, the sum of \$32,000 in return for the issuance and delivery of certificates representing 20,000 shares of stock of CORPORATION, which certificates were delivered to plaintiff via United States mail on or about May 5, 1966.

FOURTEENTH: In or about August, 1966, plaintiff tendered back to SIMON and CORPORATION all of the shares of

*Exhibit A. Complaint Filed by Joseph Auerbach Against
Pension Corporation of America and Lawrence Simon.*

CORPORATION's stock purchased by plaintiff, thereby rescinding the purchase and the rescission and tender were accepted, and SIMON commenced to repay the sum of \$80,000 which plaintiff had paid for CORPORATION's stock, to the extent of \$12,000, leaving a balance of \$68,000 due and owing, no part of which has been paid although duly demanded.

ALLEGATIONS APPLICABLE TO COUNT I

FIFTEENTH: Defendants' offers to sell the stock of CORPORATION constituted a public offering within the meaning and intent of the Securities Act of 1933 (Title 15 USC § 77 et seq.).

SIXTEENTH: By reason of the foregoing, stock of CORPORATION was required to be registered pursuant to the Securities Act of 1933 (Title 15 USC § 77 et seq.).

SEVENTEENTH: By reason of the foregoing, there is due and owing from defendants to plaintiff the sum of \$80,000, no part of which, except the sum of \$12,000, has been paid, although duly demanded.

ALLEGATIONS APPLICABLE TO COUNT II

EIGHTEENTH: In offering to sell stock of CORPORATION to the Public, including plaintiff, defendants, upon information and belief, made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading in that, among other things defendants made the statements set forth in paragraphs "SEVENTH" and "TWELFTH" hereof, which

*Exhibit A. Complaint Filed by Joseph Auerbach Against
Pension Corporation of America and Lawrence Simon.*

statements are believed to be untrue, and defendants omitted to state, among other things, information as to CORPORATION'S long and short term debt; contractual obligations; law suits threatened and pending; locations of business; number of employees and their remuneration; accounts payable; leases of real or personal property; tax liabilities; and assets, all of which was in violation of the Securities Act of 1933 (Title 15 USC § 77 et seq.) and the Securities Act of 1934 (Title 15 USC § 78 et seq.) and Rule 10(B)(5) of the Securities Exchange Commission, promulgated under the Securities Act of 1934.

NINETEENTH: By reason of the foregoing, there is due and owing from defendants to plaintiff the sum of \$80,000, no part of which, except the sum of \$12,000, has been paid, although duly demanded.

WHEREFORE, plaintiff demands judgment against defendants for the sum of \$68,000, together with interest, costs and disbursements.

OTTERBOURG, STEINDLER, HOUSTON & ROSEN

By s/ ARTHUR A. GREENFIELD

A Partner

Attorneys for Plaintiff

Exhibit B, Judgment.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil Action #1689

JOSEF AUERBACH,

Plaintiff,

against

PENSION CORPORATION OF AMERICA and
LAWRENCE SIMON,

Defendants.

It appearing to the satisfaction of this Court that defendants PENSION CORPORATION OF AMERICA and LAWRENCE SIMON have defaulted in performing the terms and conditions of the Stipulation of Settlement, all as more fully appears from the subjoined Affidavit of Kurt J. Wolff Esq., sworn to December 26, 1967 together with the exhibits annexed thereto

Now upon application of plaintiff and pursuant to the said Stipulation of Settlement it is

ORDERED, ADJUDGED and DECREED that plaintiff recover of defendants, jointly and severally, the sum of \$68,000 with interest at the rate of 6% per annum from April 1, 1967, in the sum of \$3,000, making a total of \$71,000.

s/ EDWARD PALMIERI
U.S.D.J.

Dated: New York City, N. Y.
December 27, 1967

Judgment Entered Dec. 27, 1967

s/ JOHN J. OLEAN, JR.
Clerk

**Exhibit, Affidavit of Kurt J. Wolff, Subjoined
to Judgment.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEF AUERBACH,

Plaintiff,

against

PENSION CORPORATION OF AMERICA and LAWRENCE SIMON,
Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

KURT J. WOLFF, being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice in the State of New York, and a member of the Bar of this Court. I am associated with Otterbourg, Steindler, Houston & Rosen, the attorneys for plaintiff. I make this affidavit in support of plaintiff's application for the entry of judgment against defendants, pursuant to the stipulation of settlement in this action. Defendants have completely defaulted in performing that stipulation.

2. After a judgment by default was obtained against defendants, and thereafter vacated by this Court on defendants' motion, defendants entered into a stipulation of settlement which provides for payment to plaintiff of the amount sued for. The stipulation (xerox copy of which is annexed hereto, made a part hereof, and marked Exhibit "A") requires defendants to pay the sum of \$68,000 with a first installment of \$15,000 due on December 15, 1967, and

*Exhibit, Affidavit of Kurt J. Wolff, Subjoined
to Judgment.*

the balance in twelve installments commencing January 15, 1968. The stipulation, Exhibit "A", further requires that: Check in payment of each installment be made payable to the order of my firm as attorneys for plaintiff; Delivery thereof be to my firm at its office at 500 Fifth Avenue; In the event of default in payment of any installment (such default continuing for a period of seven days from the date on which my firm mails a notice of default by certified mail to defendants' attorneys) then—

- (i) The entire unpaid balance shall forthwith become due and payable;
- (ii) Plaintiff may enter judgment against defendants, jointly and severally, for the sum of \$68,000 plus interest from April 1, 1967 . . . ;
- (iii) Such judgment shall be entered without further notice to defendants or their attorneys upon this stipulation, the complaint herein, and an affidavit by plaintiff or his attorneys setting forth the facts, the default, the mailing of the notice and the failure to cure the default.

3. I hereby certify to the Court that: The payment due December 15, has not been made; On Monday, December 18, 1967, I mailed, by certified mail, a notice of default (copy of the Notice and Certified Mail Receipt is annexed hereto, made a part hereof, and marked Exhibit "B"), to the attorneys for defendants; Default in making payment has continued for a period of seven days from the date on which the notice of default (Exhibit "B") was mailed; and accordingly, and pursuant to the stipulation and the complaint and this affidavit, judgment against the defendants, jointly and severally, for the sum of \$68,000 plus interest from April 1, 1967 should be entered.

*Exhibit, Affidavit of Kurt J. Wolff, Subjoined
to Judgment.*

4. No previous application for the relief herein requested has heretofore been made to this Court, or a judge thereof.


WHEREFORE, it is respectfully requested that this Court enter a judgment against the defendants, jointly and severally, for the sum of \$68,000 with interest at the rate of 6% per annum from April 1, 1967, in the sum of \$3,000, making a total of \$71,000.

KURT J. WOLFF
Kurt J. Wolff

Sworn to before me this
26th day of December, 1967.

BURTON D. STRUMPF,
Burton D. Strumpf
Notary Public, State of New York
No. 41-9227450
Qualified in Queens County
Commission Expires March 30, 1968

Exhibit C, Transcript of Judgment.

(See opposite )

4166

TRANSCRIPT OF JUDGMENT

JUDGMENT DEBTOR				JUDGMENT CREDITOR	ATTORNEY FOR JUDGMENT CREDITOR
Surname	Given Name	Trade or Profession	Last Known Address	Name and Address	Name and Address
Pension Corporation of	America		320 Park Ave,	Josef Auerbach	Atterbourg,
and			New York,	1501 Bway,	Steindler,
Simon	Lawrence		N.Y.	New York,	Houston & Rosen
				N.Y.	500 - Fifth Ave,
					New York, N.Y.

JUDGMENT DATED	JUDGMENT ENTERED	AMOUNT OF JUDGMENT	REMARKS: DATE AND MANNER OF CHANGE OF STATUS OF JUDGMENT
1968	Court 66, Subst. Judgment	Damages -	
Jan. 9	New York	Costs -	
	Date: 27, 1967	Total \$ 71,000.00	

DATE WHEN	SAISFIED	STATE OF NEW YORK } COUNTY OF NEW YORK }
When	How and to What Extent	
		I, JAMES MCGURRIN, Clerk of the County of New York, hereby certify that the above is a correct transcript from the Docket of Judgments in my office.
		In Testimony Whereof, I have hereunto set my name and affixed my official seal this 11th day of Jan. 1968.
		James McGurkin COUNTY CLERK, NEW YORK COUNTY

ONLY COPY AVAILABLE

DO NOT DETACH

 EXHIBIT "C"
 NEW YORK, N.Y. 10007
 100 WALL STREET
 NEW YORK, N.Y. 10007

 111 WALL STREET AND
 100 WALL STREET
 NEW YORK, N.Y. 10007



53a

**Exhibit, Affidavit of Arthur S. Cowen, in Support of
Application to Extend Duration of Levies.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOSEF AUERBACH,

Plaintiff, Judgment-Creditor,

against

PENSION CORPORATION OF AMERICA and
LAWRENCE SIMON,

Defendants, Judgment-Debtors.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARTHUR S. COWEN, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of OTTERBOURG, STEINDLER, HOUSTON & ROSEN, attorneys for plaintiff, judgment-creditor. I am fully familiar with the facts and make this affidavit in support of this application to extend the duration of levies made by the Sheriff under execution issued pursuant to CPLR 5232(a).

2. The levies in question were made by the Sheriff pursuant to execution delivered to him on a judgment entered in the United States District Court for the Southern District of New York on December 27, 1967, which judgment was docketed with the Clerk of this Court on January 9, 1968. The garnishees upon whom levy was made are for

Exhibit Affidavit of Arthur S. Cowen.

the most part, banks, and insurance companies in which the judgment-debtors maintained either accounts or from which the judgment-debtors are to receive payments in the form of commissions.

3. That heretofore and on March 12, 1968, an order was signed by Mr. Justice Sidney A. Fine extending the levies for a period of 120 days and on July 9, 1968, an order was signed by Mr. Justice Thomas Dickens further extending the levies for a period of one year. Thus, said levies will expire on July 8, 1969, unless further extended.

4. I have been advised, and verily believe, that an involuntary petition in bankruptcy has been filed against Lawrence Simon and that a defense has been interposed and a jury trial demanded on the question of his insolvency. If the judgment-debtor is ultimately determined to be solvent, and the petition dismissed, plaintiff, judgment-creditor, unless the time within which the levies heretofore made are extended, will lose the benefit of the levies as well as the priority thereby obtained.

5. Also, the validity of the judgment obtained against the defendants has come under attack and possible future litigation may ensue. In order to preserve and maintain the status quo, plaintiff, judgment-creditor's application should be granted.

6. No prejudice to the judgment-debtors or to the garnishees can accrue by reason of the granting of this application, but if the application is denied, plaintiff, judgment-creditor will be prejudiced thereby.

7. No previous application, except the applications referred to in Paragraph 3 hereof, for the relief herein re-

Exhibit Affidavit of Arthur S. Cowen.

quested has heretofore been made to this or any other Court or Judge thereof.

WHEREFORE, it is respectfully requested that this application be granted, and the above joined order be signed.

s/
ARTHUR S. COWEN

Sworn to before me this
1st day of July, 1969.

/s/ J. SAYZ
Notary Public

Exhibit D, Order.

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York at the Court-house, 60 Centre Street, in the City, County and State of New York on the 1st day of July, 1969

Present: HON. WILFRED A. WALTEMADE, Justice.

JOSEF AUERBACH,

Plaintiff,
Judgment-Creditor,

against

PENSION CORPORATION OF AMERICA & LAWRENCE SIMON,

Defendants,
Judgment-Debtors.

Exhibit D, Order.

Upon reading and filing the affidavit of Arthur S. Cowen, Esq., sworn to the 1st day of July, 1969, in support of this application for an order extending the duration of the levies,

Now, on motion of Otterbourg, Steindler, Houston & Rosen attorneys for plaintiff-judgment creditor, and sufficient reason appearing therefore, it is

ORDERED, that the effective date of the levies heretofore made be and each of them is hereby extended for an additional period of one year from the date of this order, and that until such time, the garnishees upon whom levy was made, and each of them, is forbidden to make or suffer any sale, assignment or transfer of or any interference with any interest of the Pension Corporation of America and Lawrence Simon, or pay over or otherwise dispose of any debt owed to the Pension Corporation of America and Lawrence Simon, to any person other than the Sheriff.

Enter:

/s/ W.A.W.
J.S.C.

Filed
Jul 1 1969
Co Clerk's Office
New York

Proof of Claim of Defendant Dasha Auerbach Stuart.

Defendant Dasha Auerbach Stuart, Executrix under Last Will and Testament of Josef Auerbach, for a separate Proof of Claim in the within action respectfully alleges:

FIRST: The said defendant heretofore, and on June 5th 1970, filed a Proof of Claim as part of said defendant's Answer.

SECOND: Incorporates by reference herein paragraphs "Fourth" through "Eighth" inclusive of the Answer heretofore filed by said defendant, copy of which is annexed hereto, made a part hereof, and marked Exhibit "A".

WHEREFORE, defendant Dasha Auerbach Stuart, Executrix under Last Will and Testament of Josef Auerbach, demands judgment that she be paid from the funds deposited with this Court, the full amount of the Judgment, together with accrued interest, unpaid, and for such other further and different relief as to the Court might seem just and proper.

OTTERBOURG, STEINDLER, HOUSTON &
ROSEN, P.C.

By Kurt J. Wolff
A Member of the Firm
Attorneys for defendant Dasha Auerbach
Stuart

Amended Answer and Statement of Claim of Intervener, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt.

Intervener, ROBERT B. SCHINDLER, as trustee in bankruptcy for Lawrence E. Simon, bankrupt, as and for his Amended Answer to the Complaint of plaintiff, Massachusetts Mutual Life Insurance Company and to the Statements of Claim and Proofs of Claim filed by the other defendants herein, and as and for his Amended Statement of Claim, by his attorney, Sheldon Lowe, respectfully alleges:

AS AND FOR HIS AMENDED ANSWER TO THE COMPLAINT OF PLAINTIFF MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY

1. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 24, 25, and 27 of said Complaint.
2. Denies each and every allegation set forth in paragraph 15 of said Complaint, except admits that on or about November 10, 1938 defendant Lawrence E. Simon (hereafter "Simon") executed a document in form annexed to said Complaint as Exhibit "B" and that plaintiff Massachusetts Mutual Life Insurance Company (hereafter "Mutual") executed said documents and respectfully refers to said documents for its contents.
3. Admits the allegations of paragraphs 18 and 19 of said Complaint respecting the execution by Simon of contracts with each of H. C. Copeland & Company, Inc., a general agent of Mutual, and with Desmond J. Lizotte, a general agent of Mutual, and denies knowledge or information sufficient to form a belief respecting the dates of said contracts.

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

4. Denies each and every allegation set forth in paragraph 20 of said Complaint, except admits that Mutual made payments to Simon subsequent to the execution of the document therein referred to and that payments ceased on or about March 29, 1967.

5. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph 22 of said complaint, except admits, upon information and belief, that Mutual made payments to defendant Third National Bank of Hampden County (hereafter "Third National") from and after on or about March 29, 1967.

6. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph 23 of said Complaint, except admits that no payments of renewal commission have been made to Simon by Mutual since a date prior to January 4, 1968.

AS AND FOR HIS AMENDED ANSWER TO THE STATEMENT OF
CLAIM OF DEFENDANT LAWRENCE E. SIMON

7. Denies each and every allegation set forth in paragraph 19 of said Claim.

AS AND FOR HIS AMENDED ANSWER TO THE STATEMENT OF
CLAIM OF DEFENDANT THIRD NATIONAL BANK OF HAMP-
DEN COUNTY

8. Denies each and every allegation set forth in paragraph 4 of said Claim, except admits that on or about November 10, 1938 Simon executed a document in form an-

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

nexed to said Complaint as Exhibit "B" and that Mutual executed said document and respectfully refers to said document for its contents.

9. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph 6 of said Claim, except admits, upon information and belief, that Mutual made payments to Third National from and after on or about March 29, 1967.

10. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs 7 and 8 of said Claim.

11. Denies each and every allegation set forth in paragraph 9 of said Claim.

AS AND FOR HIS AMENDED ANSWER TO THE PROOF OF CLAIM
AND THE AFFIRMATIVE DEFENSE OF DEFENDANT STERLING
NATIONAL BANK & TRUST COMPANY OF NEW YORK

12. Denies each and every allegation set forth in said Claim, except admits that judgments were entered on behalf of defendant, Sterling National Bank & Trust Company of New York (hereafter "Sterling") in form annexed to said Claim as Exhibit "A" and respectfully refers to said documents for their contents.

AS AND FOR HIS AMENDED ANSWER TO THE STATEMENT OF CLAIM
OF DEFENDANT NATIONAL BANK OF NORTH AMERICA

13. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs 1, 2 and 3 of said Claim, except admits that

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

a judgment was entered on behalf of defendant National Bank of North America in form annexed to said Claim as Exhibit "A" and respectfully refers to said document for its contents.

14. Denies each and every allegation set forth in paragraph 4 of said Claim.

AS AND FOR HIS AMENDED ANSWER TO THE PROOF OF CLAIM OF
DEFENDANT DASHA AUERBACH STUART, EXECUTRIX UNDER
THE LAST WILL AND TESTAMENT OF JOSEF AUERBACH

15. Denies each and every allegation set forth in paragraph Eighth of said Claim, except admits, upon information and belief, so much of said paragraph as alleges that the Estate of Josef Auerbach, and in particular Dasha Auerbach Stuart, Executrix under the Last Will and Testament of Josef Auerbach, deceased, is successor in interest, to the rights, if any, of Josef Auerbach in the premises.

AS AND FOR HIS AMENDED ANSWER TO THE STATEMENT
OF CLAIM OF IRVING GEIST

16. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs Third and Fourth of said Claim, except admits that a judgment was filed, entered and docketed in favor of defendant Irving Geist and Simon was served with a subpoena in form annexed to said Claim as Exhibits "A" and "B" and respectfully refers to said documents for their contents.

17. Denies each and every allegation as set forth in paragraph Fifth of said Claim.

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

AS AND FOR HIS AMENDED ANSWER TO THE PROOF OF CLAIM OF
DEFENDANTS ROYAL S. MARKS, SAMUEL G. HADDAD AND
NATALIE HADDAD

18. Denies each and every allegation set forth in paragraph Second of said Claim, except admits that a judgment was rendered against Simon in form annexed to said Claim as Exhibit "A".

AS AND FOR A FIRST SEPARATE DEFENSE TO ALL OF THE CLAIMS
ASSERTED BY ALL THE DEFENDANTS AND TO THE COMPLAINT

19. That on July 21, 1970, Lawrence E. Simon, one of the defendants in the above entitled action, filed a bankruptcy petition in the United States District Court for the Southern District of New York (file #70 B 548), and was adjudicated a bankrupt on the same date. That on July 21, 1970, the said bankruptcy proceeding was referred to the Hon. Asa S. Herzog, Referee in Bankruptcy, before whom the matter is presently pending.

20. That at a First Meeting of Creditors held in the above bankruptcy proceeding on September 8, 1970, Robert B. Schindler was appointed trustee in bankruptcy of Lawrence E. Simon, and thereafter duly qualified by filing the bond required of him and he is presently acting as such trustee.

21. That pursuant to the provisions of Section 70a of the Bankruptcy Act (11 U.S.C. Section 110a), the sums deposited into the Registry of this Court and such further sums due from Mutual to Simon under and pursuant to the

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

agreements in form annexed as Exhibits "A" and "C" to the Complaint belong to and are the property of Robert B. Schindler as trustee in bankruptcy of Lawrence E. Simon, bankrupt.

AS AND FOR A SECOND SEPARATE DEFENSE TO ALL OF THE CLAIMS
ASSERTED BY ALL THE DEFENDANTS AND TO THE COMPLAINT

22. Intervener Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and alleges each and every allegation set forth in paragraphs "19" and "20" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

23. That pursuant to the provisions of Section 70e of the Bankruptcy Act (11 U.S.C. Section 110e) the sums deposited into the Registry of this court and such further sums due from Mutual to Simon under and pursuant to the agreements in form annexed as Exhibits "A" and "C" to the Complaint are subject to a prior lien claim of Robert B. Schindler as trustee in Bankruptcy of Lawrence E. Simon, bankrupt.

AS AND FOR A THIRD SEPARATE DEFENSE TO THE PROOF OF
CLAIM OF DEFENDANT DASHA AUERBACH STUART, EXECUTRIX
UNDER THE LAST WILL AND TESTAMENT OF JOSEF
AUERBACH

24. That by orders of the Supreme Court of the State of New York, County of New York, dated March 12, 1968, July 9, 1968, July 1, 1969, June 9, 1970, May 10, 1971 and May, 1972, the defendant Auerbach extended the duration of the levy made by the Sheriff of the City of New York

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

upon the funds deposited with the Registry of this Court in this action.

25. That each of said orders is void and should be vacated because they were improperly obtained and because they contravene the Statutes of the State of New York in such cases made and provided and the case law of the State of New York.

AS AND FOR A FOURTH SEPARATE DEFENSE TO THE PROOF OF
CLAIM OF DEFENDANT DASHA AUERBACH STUART, EXECU-
TRIX UNDER THE LAST WILL AND TESTAMENT OF JOSEF
AUERBACH

26. Intervener Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and realleges each and every allegation set forth in paragraph "24" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

27. That at no time subsequent to March 12, 1968, did the defendant Auerbach institute proceedings to enforce his levy upon the sum deposited with the Registry of this Court in this action, pursuant to the Statutes of the State of New York in such cases made and provided, and sought instead to extend said levy and preserve the lien resulting therefrom by seeking and obtaining the orders described in paragraphs "24" of this amended answer.

28. That by so failing to enforce his said levy for a period of approximately four and one-half years, the lien resulting therefrom became dormant and void as against the trustee.

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

AS AND FOR A FIFTH SEPARATE DEFENSE TO THE STATEMENT
OF CLAIM OF DEFENDANT THIRD NATIONAL BANK OF
HAMPDEN COUNTY

29. Intervener, Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and re-alleges each and every allegation set forth in paragraphs "19" and "20" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

30. The Defendant Third National Bank of Hampden County failed to obtain and perfect a valid security interest in and to the funds which have been deposited with the Registry of this Court in this action, pursuant to the provisions of the Uniform Commercial Code.

AS AND FOR A SIXTH SEPARATE DEFENSE TO THE STATEMENT OF
CLAIM OF DEFENDANT THIRD NATIONAL BANK OF HAMPDEN
COUNTY

31. Intervener Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and re-alleges each and every allegation set forth in paragraphs "19" and "20" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

32. That between on or about February 15, 1970 and March 15, 1970, and within one year prior to the filing of the petition in bankruptcy as aforesaid, the above named bankrupt transferred to the defendant Third National Bank a security interest in and to the fund deposited with the Registry of this Court in this action.

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

33. That the transfer aforesaid was made while the said bankrupt was insolvent within the purview of Section 67d(1)(d) of said Bankruptcy Act, or by such transfer rendered himself so insolvent, all contrary to the provisions of Section 67d(2)(a) of the said Bankruptcy Act.

34. That certain of the creditors of the bankrupt were in existence at the time of the transfer complained of in paragraph "32" hereof.

35. That intervener trustee has insufficient assets in his hands to pay the creditors of the bankrupt.

AS AND FOR A SEVENTH SEPARATE DEFENSE TO THE STATEMENT
OF CLAIM OF DEFENDANT THIRD NATIONAL BANK OF
HAMPDEN COUNTY

36. Intervener Robert B. Schindler, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and realleges each and every allegation set forth in paragraphs "19", "20", and "32" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

37. That the transfer aforesaid was made by the said bankrupt while engaged in a business for which the property remaining in his hands was an unreasonably small capital, all contrary to the provisions of Section 67d(2)(b) of said Bankruptcy Act.

38. That certain of the creditors of the bankrupt were in existence at the time of the transfer complained of in paragraph "32" hereof and/or certain of the creditors of the bankrupt became such creditors during the continuance of the business referred to in paragraph "37" hereof.

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

39. That Intervener trustee has insufficient assets in his hands to pay the creditors of the bankrupt.

AS AND FOR AN EIGHTH SEPARATE DEFENSE TO THE STATEMENT
OF CLAIM OF DEFENDANT THIRD NATIONAL BANK OF
HAMPDEN COUNTY

40. Intervener, Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and realleges each and every allegation set forth in paragraphs "19", "20", and "32" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

41. That the transfer aforesaid was made by said bankrupt, with the intent to incur or with the belief that he would incur debts beyond its ability to pay as they matured, all contrary to the provisions of Section 67d(2)(c) of said Bankruptcy Act.

42. That certain of the creditors of the bankrupt were in existence at the time of the transfer complained of in paragraph "32" hereof and/or certain of the creditors of the bankrupt became such creditors thereafter.

43. That intervener trustee has insufficient assets in his hands to pay the creditors of the bankrupt.

AS AND FOR A NINTH SEPARATE DEFENSE TO THE STATEMENT OF
CLAIM OF DEFENDANT THIRD NATIONAL BANK OF HAMPDEN
COUNTY

44. Intervener Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

realleges each and every allegation set forth in paragraphs "19", "20" and "32" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

45. That the transfer aforesaid was made with actual intent on the part of said bankrupt to hinder, delay or defraud the then present or the future creditors of said bankrupt all contrary to the provisions of Section 67d(2) (d) of the said Bankruptcy Act.

46. That certain of the creditors of the bankrupt were in existence at the time of the transfer complained of in paragraph "32" hereof and/or certain of the creditors of the bankrupt became such creditors thereafter.

47. That Intervener trustee has insufficient assets in his hands to pay the creditors of the bankrupt.

AS AND FOR A TENTH SEPARATE DEFENSE TO THE STATEMENT OF
CLAIM OF DEFENDANT THIRD NATIONAL BANK OF HAMPDEN
COUNTY

48. Intervener Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and realleges each and every allegation set forth in paragraphs "19", "20" and "32" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

49. That between on or about February 15, 1970 and March 15, 1970, the above named bankrupt transferred to

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

the defendant Third National Bank without fair consideration a security interest in and to the fund deposited with the Registry of this Court in this action.

50. That the transfer aforesaid was made while said bankrupt was insolvent within the purview of Section 271 of the Debtor and Creditor Law of the State of New York, or by such transfer rendered itself so insolvent, all contrary to the provisions of Section 273 of the Debtor and Creditor Law of the State of New York.

51. That certain of the creditors of the bankrupt were in existence at the time of the transfer complained of in paragraph "49" hereof.

52. That Intervener trustee has insufficient assets in his hands to pay the creditors of the bankrupt.

AS AND FOR AN ELEVENTH SEPARATE DEFENSE TO THE STATEMENT OF CLAIM OF DEFENDANT THIRD NATIONAL BANK OF HAMPDEN COUNTY

53. Intervener, Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and realleges each and every allegation set forth in paragraphs "19", "20" and "49" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

54. That the transfer aforesaid was made by the said bankrupt while engaged in a business for which the property remaining in his hands after the said transfer was an unreasonably small capital, all contrary to the provisions

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

of Section 274 of the Debtor and Creditor Law of the State of New York.

55. That certain of the creditors of the bankrupt were in existence at the time of the transfer complained of in paragraph "49" hereof and/or certain of the creditors of the bankrupt became such creditors during the continuance of the business referred to in paragraph "54" hereof.

56. That Intervener trustee has insufficient assets in his hands to pay the creditors of the bankrupt.

AS AND FOR A TWELFTH SEPARATE DEFENSE TO THE STATEMENT
OF CLAIM OF DEFENDANT THIRD NATIONAL BANK OF
HAMPDEN COUNTY

57. Intervener Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and realleges each and every allegation set forth in paragraphs "19", "20" and "49" of the amended answer herein, with the same force and effect as if set forth herein and pleaded in full.

58. That the transfer aforesaid was made by said bankrupt with the intent to incur or with the belief that he would incur debts beyond his ability to pay as they matured, all contrary to the provisions of Section 275 of the Debtor and Creditor Law of the State of New York.

59. That certain of the creditors of the bankrupt were in existence at the time of the transfer complained of in paragraph "49" hereof and/or certain of the creditors of the bankrupt became such creditors thereafter.

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

60. That Intervenor, trustee has insufficient assets in his hands to pay the creditors of the bankrupt.

AS AND FOR A THIRTEENTH DEFENSE TO THE STATEMENT OF
CLAIM OF DEFENDANT THIRD NATIONAL BANK OF HAMP-
DEN COUNTY

61. Intervener Robert B. Schindler, as trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, repeats and re-alleges each and every allegation set forth in paragraphs "19", "20" and "49" of the amended answer herein, with the same force and effect as if set forth herein, and pleaded in full.

62. That the transfer aforesaid was made with actual intent on the part of the bankrupt to hinder, delay or defraud the then present or the future creditors of said bankrupt all contrary to the provisions of Section 276 of the Debtor and Creditor Law of the State of New York.

63. That certain of the creditors of the bankrupt were in existence at the time of the transfer complained of in paragraph "49" hereof, and/or certain of the creditors of the bankrupt became such creditors thereafter.

64. That Intervener, trustee has insufficient assets in his hands to pay the creditors of the bankrupt.

WHEREFORE, defendant Robert B. Schindler as trustee in bankruptcy of Lawrence B. Simon demands judgment that the Complaint of plaintiff and the Claims asserted by all other defendants be dismissed and that defendant Robert B. Schindler as trustee in bankruptcy of Lawrence

*Amended Answer and Statement of Claim of
Intervener, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt.*

E. Simon be paid all funds now and hereafter deposited with this Court in the premises, together with costs and disbursements herein and such other, further or different relief as to this Court may seem just and proper.

SHELDON LOWE
SHELDON LOWE
Attorney for Robert B. Schindler
Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt
Office & P.O. Address
475 Fifth Avenue
New York, New York 10017
Tel. No. 986-1122

Memorandum.

BAUMAN, D. J.

Robert B. Schindler, as trustee in bankruptcy of Lawrence E. Simon, has moved for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the complaint in this action on the ground that he, as trustee, has not been joined as a defendant. He has moved in the alternative, for an order pursuant to Rule 24 of the Federal Rules of Civil Procedure permitting him to intervene as a defendant in this action or for an order pursuant to Rule 25 of the Federal Rules of Civil Procedure substituting him for or joining him with Lawrence E. Simon as a defendant. Defendants Dasha Auerbach Stuart and Third National Bank of Hampden County oppose these motions and have moved for summary judgment as has defendant Lawrence E. Simon.

This is an interpleader action commenced by Massachusetts Mutual Life Insurance Company ("Mutual") against a group of competing claimants to a fund of \$144,382.82 (the "fund") on deposit in the Registry of this Court. The fund consists of monies which Mutual is obligated to pay Lawrence E. Simon, a former general agent of Mutual, under a series of contracts. All the defendants, except Simon, are creditors of Simon who assert conflicting claims against the fund. Simon, on the other hand, contends that the fund represents a pension or retirement fund and/or wages and is therefore exempt from the claims of the other defendants.

I.

The trustee's contention that this action should be dismissed for failure to join him as a party cannot be sustained. This action was commenced prior to the institution of the bankruptcy proceedings and the appointment of the trustee. His remedy therefore is a motion to intervene, not a motion to dismiss.

Memorandum.

II.

Whether intervention is proper in this case is governed by Rule 24(a) of the Federal Rules of Civil Procedure which provides in part:

“(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the matter may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.”

The initial question therefore, is whether the trustee's motion is “timely.” In determining timeliness, the first consideration is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene. *McDonald v. E. J. Lavine Company*, 430 F.2d 1065 (5th Cir. 1970). Consequently, the fact that the trustee has failed to act for a year and a half will not, of itself, bar intervention if it is necessary to protect a right which cannot otherwise be protected. *Walpert v. Bart*, 44 F.R.D. 359 (S.D.N.Y. 1961). Here, it is abundantly clear that the trustee has an interest relating to the property which is the subject of this action. Indeed, to the extent that the defendants' claims to the fund are not superior to Simon's claim, title to the fund is vested in the trustee by Section 70(a)(5) of the Bankruptcy Act. Thus, the trustee, who represents all of Simon's creditors, has an obvious interest in determining the validity of the defendants' claims. This interest, moreover, is not adequately represented by Simon since he is asserting, in part at least, an independent claim which con-

Memorandum.

flicts with the trustee's interest. Therefore, unless the trustee is allowed to intervene his ability to protect his interests against the other defendants, including Simon, will be impaired. This prospect, when balanced against the relatively slight delay in these proceedings which his intervention will cause, leads me to conclude that the trustee's motion to intervene should be granted.

In granting this motion, I wish to make clear that I do not regard the protracted illness of the trustee's counsel as sufficient excuse for his failure to act. However, I am reluctant to prejudice the rights of all of the creditors because of the trustee's nonfeasance.

III.

In view of the above disposition, the motions for summary judgment cannot be considered until the trustee has answered. Cf. *Corrosion Rectifying Co. v. Freeport Sulphur Co.*, 197 F. Supp 291 (S.D.N.Y. 1961).

Accordingly, the motions for summary judgment are denied with leave to renew the motions after the trustee has answered.

So ORDERED.

Dated: July 13, 1972.

HAROLD BAUMAN,
U.S.D.J.

Stipulation of Facts.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that, for the purposes of the instant action and the instant action alone the following facts are agreed upon (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

1. Plaintiff Massachusetts Mutual Life Insurance Company ("Mutual") is a corporation organized and existing under the laws of the Commonwealth of Massachusetts with its principal place of business in Springfield, Massachusetts.

2. Defendant Lawrence E. Simon ("Simon") is an individual who resides in New York, New York.

3. Defendant Third National Bank of Hampden County ("Third National Bank") is a national banking association organized and doing business under the provisions of the National Banking Act with its principal place of business in Springfield, Massachusetts.

4. Defendant National Bank of North America is a national banking association organized and doing business under the provisions of the National Banking Act with its principal place of business in New York, New York.

5. Defendant Sterling National Bank and Trust Company of New York is a national banking association organized and doing business under the provisions of the National Banking Act with its principal place of business in New York, New York.

6. Defendant Dasha Auerbach Stuart is the Executrix of the Last Will and Testament of Josef Auerbach.

Stipulation of Facts.

7. Defendant Irving Geist was at the time of the institution of this action, on May 12, 1970, an individual who resided in New York, New York; said defendant, died a resident of said County on November 28, 1970, and Ann Ladin, Maurice Iserman and Louis Roncs were appointed by Surrogate's Court, New York County, Executors of the Estate of Irving Geist, deceased. The caption of this action is amended accordingly.

8. Defendant Royal S. Marks is an individual who resides in New York, New York.

9. Defendants Samuel Haddad and Natalie Haddad are individuals who reside in New York, New York.

10. Defendants Henry Hecht, Sr. and Alice Hecht are individuals who reside in Baltimore, Maryland.

11. Defendant Mary Ellen Hecht, M.D., is an individual who resides in Long Island, New York.

12. Defendant Henry Hecht, Jr., is an individual who resides in New York, New York.

13. The complaint is filed pursuant to the Federal Interpleader Act of June 1948 c. 646, 62 Stat. 931, 28 U.S.C.A. 1335 (1963).

14. The amount in controversy, which has been deposited into the Registry of this Court, exceeds \$500.00, namely \$144,382.22.

15. On July 31, 1932, Simon executed a General Agent's Agreement with Mutual (Exhibit A to the Complaint). On or about November 10, 1938, defendant Simon executed a document (Exhibit B to the Complaint). Reference is

Stipulation of Facts.

made to Exhibit B of the Complaint for the terms and conditions of said document. On December 31, 1962, the General Agent's Agreement was terminated and on September 16, 1964, defendant Simon executed a new "Floor Plan Agreement" with Mutual (Exhibit C to the Complaint), pursuant to which Mutual agreed to make certain payments to Simon.

16. On or about or prior to March 29, 1967, Simon defaulted in making payment to Third National Bank of the indebtedness mentioned in Exhibit "B" and Third National Bank gave notice of said default to Mutual and defendant Simon, and thereafter Mutual made payments to Third National Bank pursuant to the terms of Exhibit "B" until on or about January 4, 1968.

17. On or about January 4, 1968, Mutual was served with a subpoena and restraining notice in a case entitled *Irving Geist v. Lawrence E. Simon*, Supreme Court, New York County, Index No. 21099/67, in which case there was filed, entered and docketed in the New York Supreme Court, New York County, on December 28, 1967, a Judgment by Confession in favor of Irving Geist, as Plaintiff, against Lawrence E. Simon, as Defendant, which said Judgment was in the sum of \$41,620.

18. As of January 1, 1970, Mutual held in escrow the Fund of \$144,382.22 (the "Fund") consisting of amounts due and owing to Simon and claimed by the other defendants herein. The Fund is comprised of three parts: \$48,971.26, representing Floor Plan Payments payable to Simon under the Floor Plan Agreement; \$95,014.21, representing renewal commissions payable to Simon under his General Agent's Agreement with Mutual; and \$396.75, representing commissions payable to Simon for new business generated by him after May, 1969.

Stipulation of Facts.

19. On December 27, 1967, the United States District Court for the Southern District of New York, in the action entitled *Josef Auerbach v. Pension Corporation of America and Lawrence Simon* (the "Auerbach Action"), entered a judgment in favor of Josef Auerbach in the amount of \$71,000, which judgment was docketed in the office of the Clerk of the Supreme Court and County of New York on January 9, 1968 and a transcript issued, following which executions were delivered to the Sheriff of the City of New York, New York County Division.

20. On or about January 19, 1968, Mutual was served with an execution and Sheriff's levy by the Sheriff of the City of New York, New York County Division in the Auerbach Action.

21. On March 12, 1968 the Supreme Court of the State of New York, County of New York, extended the levy made in the Auerbach Action for a period of 120 days from that date, to expire on July 11, 1968. On July 9, 1968, the Supreme Court of the State of New York, County of New York, extended the levies made in the Auerbach Action for a period of one year from that date. On July 1, 1969, the Supreme Court of the State of New York, County of New York, extended the levies made in the Auerbach action for a period of one year from that date. On June 9, 1970, the Supreme Court of the State of New York, County of New York, extended the levies made in the Auerbach Action for a period of one year from that date. On May 7, 1971, the Supreme Court of the State of New York, County of New York, extended the levies made in the Auerbach Action for a period of one year from that date. On May 5, 1972, the Supreme Court of the State of New York, County of New York extended the levy made in the Auerbach Action for a period of one year from that date.

Stipulation of Facts.

22. On or about June 13, 1968, Mutual was served with a restraining notice to garnishees in an action entitled *National Bank of North America v. Pension Corporation of America and Lawrence E. Simon*, Supreme Court, County of New York, Index No. 8724/68.

23. On or about October 14, 1968, Mutual was served with a subpoena and restraining notice in an action entitled *Sterling National Bank and Trust Company of New York v. Pension Corporation of America and Lawrence E. Simon*, Civil Court of the City of New York, County of New York, Index No. 59339/68.

24. On or about October 21, 1968 Mutual was served with a restraining notice in an action entitled *Kenneth Dembski v. Lawrence E. Simon*, Civil Court of the City of New York, County of New York, Index No. 129909/68.

25. On or about February 20, 1970, Third National Bank first filed in the New York City Register's Office and on or about February 25, 1970 it first filed in the Office of the Department of State of the State of New York, UCC-1 Forms not signed by Simon.

26. On or about March 11, 1970, Third National Bank first filed in the New York City Register's Office and on or about March 16, 1970 it first filed in the Office of the Department of State of New York, UCC-1 Forms signed by Simon. On or about March 12, 1970, Third National Bank first filed in the City Clerk's office in Springfield, Massachusetts, and on or about March 13, 1970 it first filed in the Office of the Secretary of State of the Commonwealth of Massachusetts in Boston, Massachusetts, UCC-1 Forms signed by Simon.

Stipulation of Facts.

27. Mutual has no interest in said sum of \$144,382.22 which it has deposited into the Registry of this Court, and a to which it was discharged from further liability by an Order of this Court dated October 15, 1970 (Lasker, J.).

28. Mutual filed its complaint commencing this action on May 12, 1970 on which date Simon owed Third National Bank \$152,735.45.

29. On said date the defendant Simon owed Irving Geist \$41,620.00 plus interest from December 28, 1967.

30. On said date the defendant Simon owed Dasha Auerbach, as Executrix of the Last Will and Testament of Josef Auerbach, \$71,000.00 plus interest from April 1, 1967.

31. The complaint was filed in good faith, not in collusion with any of the claimants, and plaintiff has not admitted the claim of, or subjected itself to independent liability to, any one of the claimants.

32. Defendant Kenneth Dembski no longer has any claim to the funds on deposit in the Registry of this Court. (See copy of letter dated July 8, 1970, attached as Exhibit A, from Arthur Morrison, Esq., attorney for Kenneth Dembski.)

33. That on July 21, 1970, Lawrence E. Simon, one of the defendants in the above entitled action, filed a bankruptcy petition in the United States District Court for the Southern District of New York (file #70 B 548), and was adjudicated a bankrupt on the same date. That on July 21, 1970, the said bankruptcy proceeding was referred to the Hon. Asa S. Hezog, Referee in Bankruptcy, before whom the matter is presently pending.

Stipulation of Facts.

34. That at a First Meeting of Creditors held in the above bankruptcy proceeding on September 8, 1970, Robert B. Schindler was appointed trustee in bankruptcy of Lawrence E. Simon, and thereafter duly qualified by filing the bond required of him and he is presently acting as such trustee.

35. On or about March 11, 1971, defendant Lawrence Simon received his discharge in bankruptcy. Reference is made to the photocopy of same attached to and made a part hereof as Exhibit B, for the terms and conditions thereof.

36. Robert B. Schindler, the Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt (the "Trustee") has been granted permission to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure, by an Order of this Court (Bauman, J.) entered the 14th day of July, 1972.

37. The trustee, by notice of motion dated March 24, 1972, moved in the Supreme Court, New York County for an order (a) vacating the orders of the Supreme Court, New York County, dated July 9, 1968, July 1, 1969, June 9, 1970 (typographical error; the correct date was June 8, 1970) and May 10, 1971, on the ground that each of said orders was predicated upon a false affidavit submitted in support of such order, (b) invalidating and declaring null and void the levies made by Defendant Dasha Auerbach Stuart, and (c) granting the Trustee such other and further relief as the Court deemed just and proper.

38. Said motion was denied by decision of the Supreme Court, New York County, dated May 1, 1972.

39. The said Denial was unanimously affirmed by the Appellate Division, First Department, by decision dated October 19, 1972.

Stipulation of Facts.

40. The decision of the Appellate Division, First Department, dated October 19, 1972, has not been appealed, and the time to make such appeal has expired.

41. In addition to the sum mentioned hereinabove in paragraphs 14, 18 and 27 which has heretofore been deposited in the Registry of this Court, plaintiff "Mutual" holds in escrow (as of January 2, 1973 renewal commissions in the amounts of \$69,859.31 and \$851.89, and floor plan payments in the amount of \$82,495.47. Additional renewal commissions will be held in escrow as earned. Plaintiff holds these sums because of the conflicting claims of the defendants and the intervening defendant, and submits them to the jurisdiction of this Court pursuant to the Federal Interpleader Act under which this action was commenced; it is prepared to pay these sums to the Clerk of the Court or to such other person or persons as the Court may order or decree.

Dated: New York, New York, February 26, 1973.

FRIEND, POST & HOPKINS

By EDWARD J. POST
A Member of the Firm
Attorneys for Plaintiff

YELLIN, KENNER & LEVY

By ILLEGIBLE
A Member of the Firm
Attorneys for Defendant
Lawrence E. Simon

Stipulation of Facts.

BLEAKLEY, PLATT, SCHMIDT, HART
& FRITZ

By THOMAS C. PLATT
A Member of the Firm
Attorneys for Defendant
Third National Bank of
Hampden County

HARRY GURAHIAN
Attorney for Defendant
Sterling National Bank &
Trust Company

LEE FRANKLIN
Attorney for Defendant
National Bank of North
America

OTTERBOURG, STEINDLER, HOUSTON
& ROSEN

By ILLEGIBLE
A Member of the Firm
Attorneys for Defendant
Dasha Auerbach Stuart,
Executrix under Last Will
& Testament of Josef
Auerbach

MAURICE ISERMAN
Attorney for Defendants
Ann Ladin, Maurice Iserman
and Louis Rones, Executors
of the Estate of Irving
Geist, deceased.

Stipulation of Facts.

MARTIN, BLOOM, LIPTON & VAN DE
WALLE

By ILLEGIBLE

A Member of the Firm
Attorneys for Defendants
Royal S. Marks,
Samuel Haddad and
Natalie Haddad

HYMAN L. KOWAL

Attorney for Defendants
Henry Hecht, Sr.,
Alice Hecht,
Mary Ellen Hecht and
Henry Hecht, Jr.

ROBERT B. SCHINDLER,
as Trustee in Bankruptcy of
Lawrence E. Simon,
Bankrupt

Exhibit A.

ARTHUR MORRISON
Counselor at Law
501 Fifth Avenue
New York, New York 10017

OX 7-7227
MU 2-0978
Area Code 212

July 8, 1970

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Mineola L. I., N. Y.

Martin, Bloom, Lipton &
Van De Walle, Esqs.
Station Plaza East
Great Neck, N. Y. 11021

Harry Gurahian, Esq.
1410 Broadway
New York, N. Y. 10018

Exhibit A.

Re: Massachusetts Mutual v. Lawrence E. Simon, Et al.

Gentlemen:

Please be advised that the matter involving Kenneth Dembski which was litigated in the Civil Court, New York County was paid following the entry of the judgment. May I respectfully inform each of you that no steps will be taken by the undersigned regarding this matter involving Kenneth Dembski in the U.S. District Court, Southern District of New York.

Yours very truly,
ARTHUR MORRISON

AM:RP

Exhibit B.

United States District Court

FOR THE

Southern District of New York

IN THE MATTER OF

Lawrence E. Simon a/k/a

Lawrence Eugene Simon

Bankrupt.

IN BANKRUPTCY

No. 70 B 548

DISCHARGE OF BANKRUPT

At New York, N.Y., in said District, on the 11th day of March, 1971.

It appearing that Lawrence E. Simon a/k/a Lawrence Eugene Simon, of 40 Central Park South, in the County of New York, State of New York, was duly adjudged a bankrupt on a petition filed by him on the 21st day of July, 1970; and

It further appearing that, after due notice by mail, no objection to the discharge of said bankrupt was filed within the time fixed by the court.

It is ORDERED that the said Lawrence E. Simon a/k/a Lawrence Eugene Simon be, and he hereby is, discharged from all debts and claims which, by the Act of Congress relating to Bankruptcy, are made provable against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy.

ASA S. HERZOG

Referee in Bankruptcy.

Special Master's Report.

This is an involved interpleader action concerning the assets of a former general agent of an insurance company. The insurance company, Massachusetts Mutual Life Insurance Company ("Mass. Mutual"), deposited in the registry of this court the sum of \$144,382.22, under the Federal Interpleader Act. Subsequently, it has accrued an additional \$153,206.67 owed to the debtor, which it holds in escrow subject to the jurisdiction of this Court. Additional credits have accrued to the account of the debtor since January 1, 1973, and will continue to accrue hereafter for an indefinite period of time. Consequently, this action must dispose of the claims to assets already on deposit in the registry, those held in escrow, and those continuing to accrue.

As the facts recited below will show, the interpleader action was necessitated by a number of judgments having been taken against the insurance agent, Lawrence E. Simon ("Simon"), at a time when his renewal commissions were already assigned to another party. The complexity of the situation became further entangled when, during the pendency of this action, Simon filed in Bankruptcy and a Trustee was appointed. (The Trustee was allowed to intervene pursuant to an order of this Court entered July 14, 1972, more than two years after the action was commenced.)

The parties attempted to stipulate to all of the facts necessary to a disposition of their conflicting claims. This proved impossible primarily because of the late intervention of the Trustee in the action. A Trial commenced before Judge Marvin E. Frankel in District Court, and, pursuant to the directions of Judge Frankel, concluded before the undersigned. Following these hearings, various of the claimants submitted proposed findings of fact in addition to those stipulated. Many of the proposed findings of fact of the parties are simply restatements of the facts stipulated to by all parties. (These, therefore, have been

Special Master's Report.

ignored.) Some of the proposed findings of facts are based upon alternate contentions which need not be considered in light of the conclusions of law set forth below. Still other proposed findings of fact were not established and, therefore, not accepted.

The facts recited below are based upon the stipulation, the exhibits referred to therein, and, where set forth within brackets, additional findings of fact made as a result of the hearings. (Some of these additional findings were not specifically requested by any of the parties but have been inserted simply to clarify the continuity of the factual chronology.) Certain of the facts are developed more fully during a consideration of each individual claim, which constitute the conclusions of law on this hearing.

FINDINGS OF FACT

Simon executed his general agents contract with Mass. Mutual on July 31, 1932 (the contract was amended from time to time in the following years but not in any manner germane to the disposition of this action. Under his contract Simon was not an employee of Mass. Mutual but was an independent contractor. He was not paid wages or salaries as such but was paid by commission, renewal commissions and other allowances including, subsequently, a "floor plan").

[Until he turned his records over to his Trustee in Bankruptcy in 1970, Simon had an office in New York City where he kept records of commissions owed to him by Mass. Mutual. The company, of course, had its own records with respect to Simon's commission entitlements and these were kept in its home office in Springfield, Mass. Records with respect to the payments of renewal premiums on policies originally sold by Simon and his subagents, and as to which renewal commissions therefore became due under his con-

Special Master's Report.

tract, were maintained by the company in Springfield, Mass.]

About November 10th, 1938 Simon entered into a loan agreement with the Third National Bank of Hampden County in Springfield, Massachusetts. As security for this loan he executed an assignment of his renewal commissions. [Thereafter additional loans were made to him in varying amounts which were repaid in part, but not in their entirety, and which continued to be secured by the original assignment of renewal commissions. When each new note was made the old note was marked "paid by renewal" and returned to Simon. Interest rates on these loans changed over the years, gradually increasing. On December 22, 1960 the Bank made its last major advance to Simon, that being in the amount of \$100,000.]

On December 31, 1962, Simon's general agency agreement with Mass. Mutual was terminated. The termination did not effect Simon's right (subject to the bank's assignment) to collect renewal commissions on business written prior to that date, providing that the renewal premiums were paid. [On July 17, 1963 Simon's then existing note with the Third National Bank matured, at which time he owed \$309,000.] Simon continued to make payments against the note until March 29, 1967, when he defaulted.

[On May 1st, 1953, Mass. Mutual placed into effect its "floor plan", announcing to its agents that it was in the nature of a retirement plan.] The provisions of the plan, however, do not so describe it. [It was not a qualified pension plan for tax purposes.] Participation in the plan was voluntary for the general agents, subject to certain requirements, and was not to be entered into by them until they had retired and their commissions had fallen below the amount of \$27,888 a year. On September 16, 1964 Simon executed his "floor plan" agreement with Mass. Mutual, pursuant to which the company agreed

Special Master's Report.

to make payments to Simon so long as he lives, provided that he met certain requirements of the agreement.*

When Simon defaulted in making payments to the Third National Bank on March 29, 1967, the bank made demand upon Mass. Mutual. Mass. Mutual then paid these renewal commissions directly to the bank, reducing Simon's indebtedness until January 4th of 1968, when several judgments were taken against Simon. (As of the commencement of the interpleader, Simon owed the Bank \$152,735.45 including accrued interest.) On December 27, 1967, Josef Auerbach took a judgment against Simon (and against the Pension Corporation of America, a corporation in which he was a principal) in the amount of \$71,000. That Judgment was entered in this Court. The following day, December 28, 1967, a confession of Judgment in favor of Irving Geist was entered against Simon for \$41,620. On January 4, 1968, Geist served a subpoena and restraining notice upon Mass. Mutual, preventing it from making further payments under its assignment to the Third National Bank.

On January 9, 1968, Auerbach (whose estate in this action is represented by executrix Stuart) entered his judgment in Supreme Court of New York County. Ten days later, January 19, 1968, Auerbach served a Sheriff's levy and execution upon Mass. Mutual. [At that time Mass. Mutual held over seven thousand dollars worth of commissions due Simon, but was unable to even partially satisfy the Sheriff's levy and execution because of the prior restraining order served by Geist, and the much earlier assignment of renewal commissions to the Third National Bank.] Therefore, on March 12, 1968, Auerbach obtained an extension of his levy from the Supreme Court of New York County for an additional 120 days.

* The agreement was terminable at will by the company each year—see page 11, *infra*.

Special Master's Report.

On June 13, 1968 Mass. Mutual was served with a restraining order and a garnishment in an action commenced by the National Bank of North America (a New York city bank) against Pension Corporation of America and Simon in Supreme Court of New York County. On July 9, 1968, Auerbach again extended his levy, this time for a period of one year. Other Judgment Creditors and potential Judgment Creditors filed restraining notices and other documents upon Mass. Mutual. [Henry Hecht, and members of his family commenced an action against Simon but it was dismissed for lack of prosecution on October 8, 1969. They were served with process in this action, appeared by counsel, but defaulted in answering or otherwise proceeding.] Auerbach again extended his levy for an additional year on July 1, 1969.

During February and March of 1970, Third National Bank filed in New York and Massachusetts certain Uniform Commercial Code forms (UCC-1). The initial New York filings were not signed by Simon but the subsequent ones were signed.

At the beginning of 1970 Mass. Mutual had accumulated funds owed Simon in a total amount of \$144,382.22, which were being held because of the prior described legal proceedings. On May 12, 1970, Mass. Mutual filed its interpleader complaint in this action in good faith and not in collusion with any of the claimants. The funds deposited in court are comprised of \$48,971.26 floor plan payments, \$95,014.21 renewal commissions, and \$396.75 initial commissions. Thereafter, on June 9, 1970, Auerbach again extended his levy for another year. On July 8, 1970 one of the claimants against Simon, Kenneth Dembski, through counsel, wrote a letter acknowledging that he had been paid and no longer had any claims upon the funds on deposit in this Court.

On July 21, 1970 Simon filed his Petition in Bankruptcy in this Court, and on September 8, 1970, Robert B.

Special Master's Report.

Schindler was appointed as his Trustee. [The Trustee has, at all times, been possessed of insufficient assets to pay all of Simon's creditors.] Simon was discharged from bankruptcy on March 11, 1971.

After the initiation of this action, Auerbach continued to obtain extensions of his levy. On March 24, 1972 the Trustee moved in Supreme Court for an order to vacate the prior extensions of levy granted to Auerbach, claiming that the affidavits in support of the applications were false and the extensions of levy were improperly obtained, contrary to the laws of New York. On May 1, 1972, the Trustee's motion was denied by a decision of the Supreme Court of New York County [holding that the applications for extensions were properly made without notice and were in conformity with the proper law and practice of New York]. This decision of the Supreme Court was affirmed on appeal on October 19, 1972.

Between the initiation of this action and January 1, 1973, additional assets accrued to Simon's account with the plaintiff as follows: \$70,711.20 renewal commissions and \$82,495.47 floor plan payments. These are also submitted to the jurisdiction of this Court.

CONCLUSIONS OF LAW

Claim of Lawrence E. Simon

A threshold issue which must be considered, albeit not a difficult one, is Simon's (the bankrupt insurance agent) claims that the "floor plan" payments constitute a pension benefit or retirement system and are therefore exempt from the claims of all creditors, and that the renewal commissions are exempt from application for satisfaction of a money judgment, except such part as is unnecessary for his support.

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The floor plan contention is based on the provisions of § 200 of the Insurance Law of New York, subdivision 7, which exempts from the operation of any law relating to bankruptcy or insolvency "the property of a retirement system, the portion of wages, or salary of an employee deducted or to be deducted, the right of an employee to a pension benefit, and his rights in the funds of the system . . .". It can be noted that, on the face of it, the statute makes no reference to judgment creditors or other types of attachments or levies. If it has any application to this case whatever, it would be only to the claims of the Trustee and those who might take through him. It would not operate to displace the several judgment creditors, particularly those who perfected their liens by levies, such as Auerbach (Stuart).

Moreover, a review of the floor plan agreement and the entire provisions of § 200 make it readily apparent that the floor plan does not qualify under subdivision 7. The agreement is a rather unusual arrangement which commences when the agent's commissions fall to less than \$27,888 a year and (when his commissions are assigned) supplements the difference between the commissions accruing and the base amount. The agreement terminates on the death of the agent or by his engaging in the life insurance business anywhere in the United States or Canada, or by any other activities which, in the sole judgment of the company, are detrimental to its best interests. Moreover, it can be revoked by the company without *any* reason on the anniversary date of the termination of the general agent's contract.

Nowhere in this floor plan agreement does it state that it is a pension or a retirement system. The argument that it constitutes such a benefit is derived entirely from an address given by the President of Mass. Mutual at a General Agents' Conference on March 30, 1953. In this address

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he indicated that the plan constituted the company's effort to provide a retirement plan for its general agents. But the company's designation and categorization is not binding on this Court or anyone else, except, perhaps, the company itself.

While Simon looks to the provisions of subdivision 7 of § 200, he totally ignores the preceding subdivisions which delineate what constitutes a retirement system or pension benefit. These sections indicate that it must be statutorily authorized, non-profit corporation or trust, licensed by the Superintendent of Insurance, with a Board of Trustees, Officers, a Constitution, By-Laws or Declaration of Trust (subdivision 1), and must be a:

"common retirement plan which has been approved by the superintendent to receive funds which are to be accumulated at interest and, subject to the conditions agreed upon, to apply the accumulated funds to provide the aforementioned benefits for the employees of the employer or group of employers as each employee retired. . . ."

Moreover, subdivisions 3 and 5 require for the separate holding and investment of the funds, and approval by the Superintendent of the certificate of contract for payments thereunder. All of this makes it readily apparent that the Mass. Mutual floor plan agreement, terminable at will by the company, is not a statutorily authorized and licensed retirement system or pension plan of the sort envisioned by subdivision 7. As the Surrogate Court wrote concerning subdivision 7 of § 200 of the Insurance Law:

" . . . a reading of the other subdivisions of this section indicates a clear intent on the part of the Legislature to restrict its application to retirement systems created and existing under and pursuant to the pro-

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visions of the Insurance Law. It is a fundamental rule of statutory construction that all parts of a statute are to be read and construed together." *In re Newton's Estate*, 177 Misc. 877, 883 (1941) *aff'd.*, 267 App. Div. 913, 48, *aff'd.* 294 N.Y. 687.

With respect to the claim that the renewal commissions are exempt to the creditors pursuant to § 5205(e) of New York's CPLR except to the extent unnecessary to support the debtor and his dependents, this section concerns only current earned income for services rendered within 60 days of their payment. While these renewal commissions have an aspect of wages about them (a point that will be considered subsequently), they are payments for services performed in the selling of contracts in preceding years. (Under his contract Simon did not have to collect the renewal premiums or take any other steps to be entitled to the renewal commissions.) Therefore, they do not literally comply with the requirements of CPLR 5205(e)(2). Moreover, the initial claimant to these renewal commissions, the Third National Bank of Hamden County, is not claiming on the basis of a garnishment or attachment, but rather upon the voluntary assignment of these commissions as a security to them in exchange for loans made by them. Such assignments of renewal commission have been found valid by the courts and would therefore not be exempt under the above CPLR provisions. *Davidson v. Massachusetts Mutual Life Ins. Co.*, 81 N.Y.S.2d 835 (N.Y., 1948); *Rockmore v. Lehman*, 129 F.2d 892 (2d Cir. 1942); *Couch on Insurance* 2d, ¶ 26:395.

The question of the relative priorities between Simon and the Trustee, to funds remaining after secured creditors are satisfied, is discussed in the section entitled "Rights of the Trustee", *infra*.

*Special Master's Report.**The Claim of The Third National Bank*

The Third National Bank's claim is the most complex part of this rather involved case. Including some interest already accrued on their notes, the amount claimed against the fund is \$164,873.52. Of course, as a claimed secured creditor this runs only against that portion of the fund comprised of renewal commissions. (Of the funds paid into Court and the amount being held in escrow by Mass. Mutual as of January 1, 1973, \$165,725.41 are renewal commissions.)

The primary contestant against Third National Bank's claim is the Trustee in Bankruptcy. By virtue of Section 70(c) of the Bankruptcy Act (11 U.S.C. § 110(c)) a Trustee has the title and right of a fully perfected judgment creditor as of the date of Simon's bankruptcy petition.

Initially the Trustee in Bankruptcy alleges that the assignment by Simon to the Third National Bank was invalid, since, not having been initially recorded, it would constitute a secret lien. *Taylor v. Barton Child Company*, 228 Mass. 126, 117 N.E. 43 (1919). Since the assignment was continued, and indeed even recorded pursuant to the Uniform Commercial Code ("U.C.C."), at a time when Simon had become insolvent, the Trustee argues that the assignment per se is fraudulent. *MacLachlan on Bankruptcy*, § 282, p. 327. Finally, the Trustee contends that New York's U.C.C. required the filing of a continuation statement within three years of its effective date (i.e. by September 27, 1967), and that having failed to do so until two and a half years later, and then having filed a financing statement rather than a continuation statement, its secured interest lapsed.

Before considering the status of the assignment of future renewal commissions, it is necessary to determine whose law applies. Third National Bank argues that the applicable law would be the law of the state of performance

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of the last necessary act validating the contract (here Massachusetts). *Fremay v. Modern Plastic*, 15 A.D.2d 235 (1st Dept. 1961); *Pearsall v. John Hancock Mutual Life Ins. Co.*, 321 Mass. 361, 73 N.E.2d 612 (1947). Alternately, if New York's center of gravity or most significant contacts tests are applied (see *Auten v. Auten*, 308 N.Y. 155 (1954); *Downs v. American Mutual Liability Ins. Co.*, 14 N.Y.2d 266 (1964); *The Matter of Havemeyer*, 17 N.Y.2d 216 (1966)), it would appear that Massachusetts law should be applicable. Simon's agency contract was made in Massachusetts; the loans were made in Massachusetts; the security assignment was made from a Massachusetts insurance company to a Massachusetts bank; the renewal commissions were received in Massachusetts and credited to Simon's account there, and payments were made directly (for a time) from the Massachusetts insurance company to the Massachusetts bank. It would appear, therefore, that the parties contemplated Massachusetts law as governing and that, in any event, Massachusetts has the most significant contacts with the filing of the security interest in the renewal commissions.

However, the U.C.C. has adopted its own test for those transactions under the Code's coverage. In New York's U.C.C. the controlling sections are 1-195 (choice of law) and section 9-103, which deals specifically with the problem of choice of law in secured transactions which have contacts in more than one jurisdiction. In order to apply New York law to these facts, there must be sufficient contacts with the Code state to permit that state to exercise its jurisdiction over the transaction in the first instance. Benders U.C.C. Service, *Secured Transactions Under U.C.C.*, Vol. 1, § 5.07, at p. 394). Section 9-102(1)* pro-

* Which applies unless Section 9-103 is applicable—see pp. 20-26, *infra*.

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vides, generally, that Article 9 applies to any transaction intended to create a secured interest in personal property and to any accounts, contract rights or chattel paper "so far as concerns any personal property . . . within the jurisdiction of this State". Of course the assets which were the subject of this interpleader action were continually in Massachusetts until deposited with the Court at the commencement of this action in this District. The remaining assets being held in escrow are still in Massachusetts where the company maintains its account. Consequently, under any approach it appears Massachusetts law should control.

The Massachusetts cases on which the Trustee relies for the contention that the assignment of renewal commissions without recording is invalid as a "secret lien" (e.g. *Taylor v. Barton Child Co.*, *supra*) concern accounts receivable. With the exception of accounts to be received in the future, Massachusetts law has always been that an assignment of money to become due in the future under a contract is a valid and perfected instrument without notice or recording. *Claycraft Co. v. John Bowen Co.*, 287 Mass. 255, 191 N.E. 403 (1934); *Commercial Casualty Ins. Co. v. Murphy*, 282 Mass. 100, 184 N.E. 434 (1933); *Great American Indemnity Co. v. Allied Freightways, Inc.*, 325 Mass. 568, 91 N.E. 2d 823 (1950). These renewal commissions are much more in the nature of a contract right than an account receivable and, indeed, this is acknowledged by the Trustee in his Trial Memorandum, p. 7 (2d full paragraph). Indeed, there is even some question as to whether *Taylor v. Barton Child Co.*, *supra*, is still applicable in Massachusetts since the enactment of Chapter 107A of the Massachusetts' General Law in 1945 which deals with the assignment of accounts receivable.

An insurance company can forbid agreements to assign renewal commissions or insure their own right to withhold the payment of such renewal commissions in satis-

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faction for the debt of the agent. *Mutual Trust Life Ins. Co. v. Wemyss*, 309 F.Supp. 1221 (D.Me. 1970). In the absence of such restrictions, the assignment would be deemed valid under the insurance law of virtually every state. *Couch on Insurance 2d*, § 26:395.*

Notice of the assignment was given to Mass. Mutual from whom these payments were due and, indeed, Mass. Mutual for a period of time made payment of the renewal commissions directly to the bank. To this extent the transaction was similar to an assignment of wages. Under New York's Personal Property Law, § 46, notice of an assignment of wages is required only to the assignor's employer (see discussion page 25, *infra*).

The Trustee's final argument, that under the U.C.C. filings were required in order to maintain the security interest which were not properly made, is the most complex. The Bank's initial rejoinder to this is that Massachusetts law applies and under the Massachusetts' U.C.C. filings are unnecessary on transactions which commenced, and security interests which passed, prior to the effective date of the Massachusetts Code. Section 19, Chapter 765, Acts of the General Court of Massachusetts, 1957. (The assignment was made years before, but additional loans were made thereafter.) Even though Massachusetts' law applies generally, the U.C.C. of both states concerning the necessity and the proper place for filing provides in Section 9-103(1):

"(1) If the office where the assignor of accounts or contracts rights kept his records concerning them is in this state, then the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located."

* See also authorities cited on page 14, *supra*.

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Section 9-103(2) specifies that "general intangibles" are governed by the law of the state where the debtor has his chief place of business. As indicated earlier, the renewal commissions are a contract right, although their assignment is similar to an assignment of wages.

Simon's principal place of business, the locus of his personal records, and his residence are New York. New York's § 10-102(2) of U.C.C. specifies that in transactions validly entered into before the effective date of the Code:

"(c) which was perfected when this Act takes effect without any filing, refiling or recording, and for the perfection of which the filing of a financial statement would be required if this Act applied, continues until and will lapse twelve months after this Act takes effect if the security is in accounts or, otherwise, thirty-six months after this Act takes effect; unless, in each case, a continuation statement is filed by the secured party before the perfection of the security interest would otherwise lapse."

The New York Act having been effective on September 26, 1964, the final date for any possible filing would have been September 26, 1967. Moreover, the documents filed by the bank appear to be a financing statement while, if the Act applies, a continuation statement would have been required to continue the secured interest. This could lead to the anomolous result that, although Massachusetts law applies generally, and Massachusetts would consider the assignment valid since it accrued prior to the effective date of the U.C.C., another section of its laws defers to the law of the jurisdiction of the state where the debtor's office is located (New York), and its laws invalidate the assignment after three years from the effective date of the U.C.C. where no proper recording is made.

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When dealing with renewal commissions (as contrasted with initial commissions), the pertinent records are those kept in Massachusetts concerning the receipt by the company of the renewal premium and the crediting of the commission to Simon's account. (Simon's contract did not call for him to collect renewal premiums.) From Simon's own records all he could tell was that he had sold a policy and that a renewal premium was *due* on a given anniversary date. The operable act which vested the commission, the receipt of the premium by the company in Massachusetts, is not reflected in Simon's records. While the Trustee contends that Gilmore, Vol. 1, *Security Interests In Personal Property*, § 10.9, p. 321, supports his position, the example given (which the Trustee concedes is "precisely the situation in the instant case" (Trustee's Supplemental Trial Memorandum, p. 32) would make Massachusetts the filing state:

"For example, assume an assignment of rights under a contract which is to be performed in State B. The records are kept in State A, where the contractor has an office, but all other relevant contacts (execution and performance of the contract, payment and so on) are in State B. If both A and B are Code states, filing in State A would be the only way of perfecting the security interest in either state."

Finally, it is far from clear that, even if New York's law controls, pursuant to U.C.C. § 9-103(1), New York's § 10-102(2) should be applicable to the assignment after its passage. As Judge Mulligan stated in the recent case of *In Re Appliance Packing and Warehouse Corp.*, 475 F.2d 1011, 1013 (2d Cir. 1973):

"While §§ 10-101 and 10-105 have been criticized as somewhat vague, we interpret § 10-102(2) to mean that

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the mere fact that these payments were to be made after the effective date of the Code, does not make the Code applicable to the 1964 note. See *James Talcott, Inc. v. Shulman*, 82 N.J. Super. 438, 198 A.2d 98 (App. Div. 1964); cf. *Gem Corrugated Box Corp.*, 427 F.2d 499, 502 n. 2 (2d Cir. 1970)."

As of the date that New York's U.C.C. became applicable (September 26, 1962), the situation of the parties was that the assignment had been completed some 25 years earlier (with notification given to the insurance company), the last advance on the loans had been more than three years earlier, and the final note had matured the prior year.* The only act which occurred after New York's law became effective between those parties was that Simon continued payments on the note until his default in 1967, when the bank in Massachusetts looked to, and received for a period of time, direct payments of the renewal commissions from Mass. Mutual. Whether this is a sufficient transaction to invoke New York's U.C.C. appears doubtful:

"The 'extension of mortgage' agreement merely extended the time for payment of the note until July 1, 1967, and in our view did not alter Arista's and Appliance's liabilities on the instrument. The May 26, 1965 guarantee, the other mortgage and the \$37,500 promissory note, were in our view separate transactions which did not modify or relate to the 1964 note. Therefore the guarantee could not give Appliance any greater rights against Arista for payments made on account of the note." *In Re Appliance Packing and Warehouse Corp.*, *supra*, at 1013.

* A separate transaction occurred on December 6, 1967 when \$8400 was loaned on a new note of which \$3,838.57 was repaid.

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One final consideration is that, even if New York's law was applied for all purposes, its U.C.C. would not apply to an assignment of renewal commissions. Section 9-104 of the U.C.C. states that Article 9 does not apply to "a transfer of a claim for wages, salary or other compensation of an employee". (New York's Personal Property Law, § 46-49, would apply and it does not require filing under the facts of this case.)

The Trustee concedes that renewal commissions might be considered "other compensation" but that Simon was not an "employee". Actually, New York law considers an insurance agent who works for only one company (as contrasted to an "independent" agent) as an "employee" for certain purposes (e.g. Workman's Compensation). *Gordon v. New York Life Ins. Co.*, 300 N.Y. 652 (1950). For these purposes, the assignment is identical in most considerations to an assignment of an employee's compensation (such as profit sharing plans or other contingent future earnings). Anyone interested in taking a secured interest therein would most certainly notify the insurance company employer (whose consent to the assignment was necessary in any event—§ 14 of the Agent's contract). A failure by the company to advise of a prior assignment could estop it from refusing the subsequent assignment.

For all of the foregoing considerations, it would appear (although the question is not entirely free from doubt) that the Bank's allegedly ineffective compliance with New York's U.C.C. filing requirements, did not invalidate the Bank's secured interest in the renewal commissions, and that it has priority to them, at least until the appointment of a Trustee in Bankruptcy (a point to be considered later). It also renders unnecessary consideration as to whether the Bank's belated filing of U.C.C. forms could revitalize a lapsed security interest under *Lynch v. County Trust Co.*, 404 F.2d 1149 (2d Cir. 1968), or whether these transactions

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(within one year of the bankruptcy) constituted a fraud on the creditors under Section 70(e) of the Bankruptcy Act.

Claim of Dasha Auerbach Stuart

The claim of Stuart* is based upon a settlement of an action in this Court reduced to Judgment and followed by a levy of execution. The levy was extended on several occasions, pursuant to orders of the New York courts. Stuart was the first (and only) of the creditors to perfect his judgment lien against Simons' assets, the others having merely served restraining notices or subpoena duces tecums. (See discussion of this point under heading "Claims of Other Defendants", *infra*.)

At the time the Stuart judgment was perfected, there was only one other outstanding lien, that being the assignment of renewal commissions to the Third National Bank. As between these parties, Stuart has stipulated that the Bank has priority as to all renewal commissions payable under the contract, and the Bank has conceded Stuart's priority to all sums resulting from floor plan payments and personal commissions. (Personal commissions are different from general agent's renewal commissions and were not involved in the assignment to the Third National Bank.) That result appears correct in any event.

At the time of the Stuart levy the plaintiff owed Simon approximately \$7,606.85 in commissions and floor plan payments (a floor plan payment having accrued on January 1). These sums were not paid because of the restraining notice of Geist and the prior lien on the renewal commissions of the bank. Consequently, the levy was of a continuing nature.

Weinstein, Korn and Miller, in their treatise on *New York Civil Practice*, in discussing the continuing nature

* The original creditor was a Mr. Auerbach, now deceased. Stuart is executrix of his estate.

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of such a levy, state:

"The third sentence of CPLR 5232(a) makes it clear that an effective levy applies not only to the judgment-debtor's property held by the garnishee or debts owed to the debtor by the garnishee at the time of service, but also to any of the judgment-debtor's property that comes into the garnishee's possession or custody or any debt owed to the judgment-debtor coming due while the levy is effective. The continuing nature of a levy under CPLR 5232(a) is in accord with the similar character of the restraining notice and the levy under an attachment. See ¶ 5222.13; CPLR 6214." 6 *Weinstein-Korn-Miller, supra*, ¶ 5232.10 (1972)

The Trustee argues that the future floor plan payments were contingent and not certain and that, under Section 5201 of New York's C.P.L.R., they did not attach. This is true. However, when the payments came due, the levy, still being in effect, attached to them, at least until such time as Simon filed in bankruptcy (a point considered in the Section "Rights of the Trustee", *infra*).

The only serious attack made upon Stuart's position is the contention that the perfected judgment lien has lost its priority. Indeed, the Trustee went to the New York courts seeking to have the levies set aside. The Supreme Court of New York County rejected the Trustee's attack, finding that there is nothing in the C.P.L.R. which limits the granting of extensions as contended by the Trustee, and that they need not be made on notice. This would seem to dispose of the issue. However, the Trustee argues that, although the holding of the Supreme Court as affirmed by the Appellate Division is *res judicata* against him on the issues there decided, he has an additional reason for having the levy set aside that was not raised in New York Supreme Court, and seeks to have that claim adjudicated

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here. His claim is that the Stuart judgment was allowed to grow "dormant" by not being enforced and it has, therefore, lost its priority. Stuart contends that the Trustee is foreclosed by *res judicata* from raising this issue.

The *res judicata* issue has three separate parts. The first question is whether or not the issue of dormancy was raised in the New York courts and considered there. (If it was, the Trustee concedes he would be foreclosed from raising it here.) The second question is, if the dormancy issue was not adjudicated in the New York courts, can the Trustee nevertheless be estopped by virtue of his failure to raise it. This leads to the final question—whether the dormancy issue was one which could and should have been raised in New York courts.

The first question is primarily factual. It is clear that the issue of dormancy was not raised in those terms in the Supreme Court before Judge Fein. It was touched on in the appeal only at the end of a rather lengthy brief in which the statement was made that it was the position of the Trustee that the liens were "dormant", and that this position was being asserted in the Federal court. Regardless of whether this was an indirect introduction of the question into the appeal, since the issue was not raised in the trial court, it was not properly a part of the appeal, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). There was, therefore, no actual adjudication of the dormancy issue in the state courts.

The application of *res judicata* is, however, not confined only to matters actually litigated. The Supreme Court, in *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946), stated:

"In general a judgment is *res judicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."

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This was not a novel statement since the court had held, almost a century ago, in *Cromwell v. County of Sac.*, 94 U.S. 351, 352 (1876), that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound:

"not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

It is clear, therefore, that the Trustee, by unsuccessfully litigating in the State court, is bound as to matters which might have been litigated there and may not relitigate in the Federal courts. *Heiser v. Woodruff*, *supra*; *Davis v. Friedlander*, 104 U.S. 570 (1881), *Fischer v. Pauline Oil & Gas Company*, 309 U.S. 294 (1940).

The remaining issue is whether the dormancy issue could properly have been litigated in the New York courts. Admittedly, a dormancy claim can be raised in the Federal Bankruptcy Courts. *In Re Monarch Acetylene Co.*, 229 Fed. 474 (W.D.N.Y. 1916); *In Re Schwab Printing Co.*, 59 F.2d 726 (7th Cir. 1932). However, there are cases in which the dormancy issue was litigated in the State courts albeit not by a Trustee in bankruptcy. *Excelsior Needle Co. v. Globe Cycle Works*, 48 App.Div. 304 (4th Dept. 1900); *Sage v. Woodin*, 66 N.Y. 578 (1876); *Kimball v. Munger*, 2 Hill 364 (Sup.Ct. 1842); *Williams v. Standard Oil Co.*, 219 App. Div. 193 (4th Dept. 1927). The Trustee has offered no authorities to establish his contention that he could not have litigated dormancy in the New York proceeding, had he wanted to. The dormancy claim is interrelated to the issue primarily raised in the New York courts as to the validity of the renewal of the liens and levies. That it may have seemed more desirable to the Trustee to

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assert this claim in Federal court does not excuse his splitting his grounds for upsetting the levy extensions. Therefore, the judgment of the Supreme Court is *res judicata* against the Trustee on the "dormancy" allegation.

In light of the foregoing it is unnecessary to consider the claim that the lien of Stuart had elapsed because of its dormancy. However, even a casual consideration of the subject indicates that the doctrine would be inapplicable in this factual context. The cases creating this doctrine (see e.g. *Excelsior Needle Co. v. Globe Cycle Works*, *supra*, and cases cited in *New York Civil Practice*, Vol. 6, ¶ 5202.22 and 5234.11) usually involve directions to a Sheriff to delay execution of levy. As stated in *New York Civil Practice*, Vol. 6, ¶ 5202.22:

"Dormancy generally results from the judgment creditor directing the Sheriff to delay the enforcement of the judgment."

When Stuart first levied on his judgment by serving Mass. Mutual, they had already received a restraining notice from another judgment creditor, and the renewal commissions had been assigned to still another creditor for some years. There was no possible way that Stuart could have compelled Mass. Mutual, in light of these conflicting claims, to have paid the monthly renewal commissions it held to him. Thereafter, a number of other creditors made their appearances on the scene, further inhibiting any possibility of satisfying his judgment from Mass. Mutual. Ultimately, of course, Mass. Mutual placed the matter in litigation by commencing this interpleader action. While Stuart continued to extend his levies it appears very doubtful that there was any need to do so since the requirements of C.P.L.R. 5232(a) concerning the commencement of an action seems to have been satisfied. Consequently, the dormancy argument appears to have no merit, which is, perhaps, why it was not pursued in the State courts.

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Under the foregoing circumstances, it is apparent that Stuart is the priority claimant to the floor plan payments and personal commissions of Simon, at least as to those which accrued prior to a Trustee in Bankruptcy being appointed. Of the funds in the Court's registry, this amounts to \$49,368.10. Between May 12, 1970 and January 1, 1973 an additional \$82,495.47 accrued in floor plan payments and is being held by Mass. Mutual in escrow. This would be more than adequate to cover the \$71,000 judgment, even with the six years interest that has accrued. However, the record does not reveal how much of this accrued before Simon filed in bankruptcy on July 21, 1970. The effect of the bankruptcy will be considered in the section entitled "Rights of Trustee".

Claims of Other Defendants

The remaining defendant claimants can be considered jointly, with the position of the intervening Trustee to be considered separately. The other claimants, not previously discussed, are the Sterling National Bank and Trust Company of New York, the National Bank of North America, Irving Geist, Kenneth Dembski, Royal S. Marks, Samuel and Natalie Haddad, and the Hecht family.

The Hechts' commenced an action against Simon which was dismissed with prejudice for lack of prosecution in October of 1969. Although they appeared by counsel in this action, they have never filed any answer or any other pleadings and are consequently not entitled to any funds from this interpleader.

Dembski, as indicated in the Findings of Fact, stated that his claim had been paid and therefore was withdrawn.

Geist was the first of the judgment creditors to act, but, he served only a restraining notice. This was insufficient under New York law to give him any priority. *City of New York v. Panziner*, 23 A.D.2d 158 (1st Dept. 1965); *Fehr v. First Americana Corp.*, 31 A.D.2d 967 (2d Dept. 1960),

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Bankers Trust Co. v. State of New York, 28 A.D.2d 272 (3rd Dept. 1967). The same is true of the remaining claimants, Sterling National Bank, National Bank of North America, Marks and the Haddads. They are no more than general creditors and will share, if at all, from funds remaining after the two priority creditors have been satisfied or to the extent that they may receive a distribution in the bankruptcy from the funds collected by the Trustee.

It is argued that this is inequitable and that all creditors (or at least all judgment creditors) should share equally. The simple answer to this is that any of the other judgment creditors could have sought Simon's involuntary bankruptcy at least by early 1968 and perhaps have affected Stuart's priority. That they had pause in doing so, may reflect certain advantages that resulted for Simon from bankruptcy, as will be demonstrated in the next section. In any event, two and a half years elapsed during which over \$50,000 (and perhaps as much as the entire Stuart judgment) in "floor plan" payments accrued, before Simon was adjudicated a bankrupt.

Rights of the Trustee

As of the date of the filing of the petition in bankruptcy the Trustee became vested by operation of law with the title of the bankrupt and the rights and powers (inter alia) of a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings. Bankruptcy Act (11 U.S.C. 110) § 70 (a) and (c). Although there are two prior secured creditors (Third National Bank and Stuart), considering the assets which have accrued since January 1, 1973, there may be an excess remaining after their claims have been satisfied. It is also necessary to consider the effect of the adjudication of bankruptcy on the claims.

It is clear that if the renewal commissions and floor plan payments were considered wages earned within 60 days

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before bankruptcy, they would be ninety percent exempt from the claims of the Trustee and from the Bankruptcy proceedings. New York C.P.L.R. 5205(e)2. Renewal commissions, under the laws of some states, constitute wages and hence are exempt. *In Re Green*, 34 F.Supp. 791 (D.C.Va. 1940); *Couch on Insurance 2d*, § 26:389 at 356. Other authorities have considered renewal commissions as contract rights that pass to the Trustee if the bankrupt has no further duties with respect to the collection of the commissions. *In Re Leibowitt*, 93 F.2d 333 (3d Cir. 1937), *cert. den.*, 303 U.S. 652 (1938).

In this Circuit, however, it was long ago held that the Trustee in Bankruptcy takes title to renewal commissions on policies sold prior to Bankruptcy, even if, under the agency contract, there were additional service to be performed in order to earn the commissions. *In Re Wright*, 157 F. 544 (2d Cir. 1907). The Court in *Wright* took cognizance of the fact that the agent did not have a property right *in praesenti*, and that his interest was contingent and defeasible. After looking to see whether the contract right was assignable, and having found that it was, the Court held that it was transferred to the Trustee under the Bankruptcy Act, stating:

" . . . the fact that the interest is defeasible does not prevent its transfer. Defeasible and contingent interests of this nature are assignable". 157 F. 544, at 546.

The Court noted that the bankrupt had certain functions to be performed in connection with the collection of the renewal premiums and exempted from the property to be transferred to the Trustee a collection charge. No such functions appear in Simon's contract. Consequently, the Trustee has priority over Simon to the renewal commissions.

As between the Trustee and the assignment to the Third National Bank, while it held a perfected lien, its lien was

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inchoate and its interests were both contingent and defeasible. At the adjudication of the bankruptcy, much of the commissions and floor plan payments now held in escrow by Mass. Mutual were not then in existence and might never have come into existence. Title was perfected only when the renewal premiums were paid. *Bishop v. Commissioner of Internal Revenue*, 54 F.2d 298 (7th Cir. 1931). However, a valid lien on property obtained more than four months before bankruptcy is unaffected by a bankruptcy discharge, 1 A, *Collier on Bankruptcy*, § 17.29. The assignment of the renewal commissions to the Third National Bank created an equitable lien which attached to the commissions when the premiums were paid, and the lien relates back to the date of assignment. *Bishop v. Commissioner of Internal Revenue*, *supra*; *Caldwell v. Armstrong*, 342 F.2d 485 (10th Cir. 1965); *Williams v. Stockman National Life Ins. Co.*, 509 P.2d 1276 (Col. 1973). Consequently, the lien of the Third National Bank survived the petition in bankruptcy and vested the renewal commissions due when the renewal premiums were paid with a relation back to the time prior to the bankruptcy when the policies were sold. As between the bankrupt and the trustee, any sums payable for renewal commissions in excess of that needed to satisfy the liens of the Third National Bank should pass to the Trustee, assuming the Stuart lien has been satisfied.

The position of the floor plan payments is somewhat similar. The Stuart judgment achieved a priority lien on all floor plan payments credited prior to the bankruptcy (which may, or may not, be sufficient to satisfy the judgment with interest). As to floor plan payments that accrued after bankruptcy, they would appear to be in the nature of a minimum renewal commission earned for services prior to it. Like the renewal commissions, the lien was inchoate, uncertain as to amount and defeasible. However, under the authorities concerning renewal commis-

Special Master's Report.

sions cited above, the judgment lien would continue to attach and relate back until satisfied. But the floor plan has one additional consideration, that it could be cancelled by the company "as of any anniversary of the date of the termination of the Contract" (§ 5(c)) (i.e. December 31st). This, as will be shown later, takes it out of the bankruptcy and makes it an asset of Simon.

If the floor plan payments revert to Simon after bankruptcy, Stuart has an additional ground for claiming priority, namely that its judgment was founded in fraud and is therefore not dischargeable pursuant to § 17(a)(2) of the Bankruptcy Act. In light of the fact that the sums accrued prior to bankruptcy may be sufficient to satisfy Stuart's judgment, and if they are not, Stuart would follow the Bank as the second secured creditor on the renewal commissions, it is not necessary to give extended consideration to this alternate grounds. It can, however, be noted that the original complaint alleged an action under the Securities and Exchange Act of 1934 (15 U.S.C. 77 et seq) and Rule 10(b)(5) of the SEC, claiming misrepresentation and non-disclosure. The action was settled by stipulation which allowed the entry of judgment if installment payments were not made (which apparently occurred). The fact that the action was not litigated to a conclusion does not prevent the resulting judgment from being exempt from discharge (1 A, *Colliers on Bankruptcy*, § 17.16[4]). (Whether a 10(b)(5) Securities claim constitutes the kind of fraud and deceit necessary to be exempt from the discharge was a point not challenged by Stuart's opponents.)

There still remains the disposition of the floor plan credits after the Stuart judgment (with interest) has been satisfied. If the bankrupt could have transferred his rights, they pass to his trustee even though the interest is contingent and defeasible. *In Re Wright, supra; In Re Baxter*, 104 F.2d 318 (6th Cir. 1939). Although the insur-

Special Master's Report.

ance company could, in its own discretion, terminate these payments, it could not do so before the anniversary date of the termination of the contract. Consequently, when Simon was adjudicated a bankrupt on July 21, 1970 the floor plan payments were assignable for the rest of the year and, to the extent not necessary to satisfy Stuart's judgment, shall pass to the Trustee.

The status of the floor plan payments which occurred after January 1, 1971 is a more complex and unique question. While they have some characteristics of vested renewal commissions, and some of a pension, on the face of the agreement, and to the extent that the evidence shows, the continued payment by Mass. Mutual is a gratuity. As a contingent gratuity it would not appear to be assignable. Although Mass. Mutual saw fit to pay these benefits in 1971 and 1972 (the record is not explicit as to 1973 but, the inference was that the benefit is still accruing) this could not have been foreseen with any certainty at the time of bankruptcy. Section 70(a) was amended in 1938 to include as vesting in the Trustee, bequests, devises and inheritances which vest in the bankrupt within six months after bankruptcy. "Bequests", however, have been interpreted as being limited to testate successors under a will. 4 A, *Colliers on Bankruptcy*, § 70.27; *Friedman v. McHugh*, 168 F.2d 350 (1st Cir. 1948). These assets, therefore, should be paid to Simon.

Interpleading Plaintiff's Counsel Fees

The attorney for the interpleading plaintiff has claimed counsel fees in the total amount of \$18,900 and disbursements of \$1,726.48. (The disbursements are primarily the cost of the reporter and the transcript of these proceedings, these not having been ordered by any other party.) In support of the claim for counsel fees, plaintiff's counsel has established that his firm spent approximately 250 hours

Special Master's Report.

on the case at a rate of \$75 an hour for the lead counsel, Mr. Post, senior partner of plaintiff's firm, and at a rate of \$50 an hour for associates time. That these hours were spent is not contested, nor is the reasonableness of the hourly time charge for Mr. Post, who is one of the deans of the Insurance Bar in New York City. Some of the defendants, however, maintain that the total amount of time spent was unnecessary for the interpleader action.

The necessity of commencing the interpleading proceedings is apparent. Moreover, this was not a routine interpleader where the stakeholder could deposit all the assets held and withdraw. Because of the unusual nature of the contractual rights owed to Simon, substantial additional assets have accrued since this action was commenced, and, in the future, credits will continue to accrue. For this reason the plaintiff has had to concern itself not only with a discharge as to money deposited, but also in obtaining a disposition of prospective assets, since otherwise additional litigation will ensue. In addition to this, the large number of claimants, the diversity of the basis for their claims, and the extent to which the disposition of the action depends upon materials within the files of the plaintiff, required the Court and counsel for the other parties to call often upon the time of plaintiff's counsel. This resulted in an unusually large number of hours being expended.

On the other hand, Mass. Mutual had an independent interest in the status of the account of Mr. Simon. It had a claim against Simon and the Pension Corporation of America (of which he was the principal) for rental due it. It offset this against commissions due him, to a total of \$30,404.56. The evidence shows that it felt a moral obligation to the Third National Bank not to assert this offset if it affects the Banks recovery of the entire loan. Consequently, it is recommended that a legal fee in the total

Special Master's Report.

amount of \$14,200 be awarded to plaintiff's counsel, and that disbursements be allowed in the amount claimed, namely \$1,726.48.

Some allocation of the payments to counsel must be made since the two priority claimants take from different funds. Of the total sums accrued to January 1, 1973, renewal commissions amount to somewhat more than floor plan payments. However, accruals since then are primarily floor plan payments. Consequently, an equal attribution seems appropriate.

CONCLUSION

Moneys in the Registry of the Court

The sum of \$144,382.22 held by the Court should be distributed as follows:

1. to plaintiff's counsel, Friend, Post & Hopkins, the sum of \$15,926.48.
2. to Third National Bank of Hampden County, the sum of \$87,050.97.
3. to Dasha Auerbach Stuart, executrix under the will of Josef Auerbach, the sum of \$41,404.77

Moneys Held in Escrow by Mass. Mutual

The moneys held in escrow by Mass. Mutual accrued prior to January 1, 1973 should be paid as follows

1. to Third National Bank of Hampden County, the sum of \$70,711.20
2. to Dasha Auerbach Stuart, executrix under the will of Josef Auerbach, the sum of \$71,000 plus interest at the legal rate from December 27, 1967, less the \$41,404.77 paid as above.

Special Master's Report.

3. to the Trustee, any floor plan payments for the year 1970 remaining after the above distribution.
4. to Simon, any floor plan payments accrued after January 1, 1971, remaining after the above deductions.

*Credits for Renewal Commissions
Accruing Since January 1, 1973*

Any credits for renewal commissions which have accrued to the account of Simon since January 1, 1973, should be distributed as follows:

1. to the Third National Bank of Hampden County, an amount computed as follows: \$152,730.45 plus interest from May 12, 1970 at the rate of $5\frac{1}{2}\%$ to date of payment, less \$157,762.17 paid above.
2. to the Trustee, any sums remaining after making the above payment.

GERARD L. GOETTEL
Gerard L. Goettel
United States Magistrate

Dated: New York, N.Y.
January 30, 1974

**Special Master's Letter of Transmittal of Correction
Sheet Amending Report.**

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
United States Courthouse
Foley Square
New York, N. Y. 10007

GERARD L. GOETTEL
Magistrate

February 20, 1974

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RE: *Mass. Mutual v. Simon*

Gentlemen:

After receiving letters from counsel in this action responding to my report of January 30, 1974 certain changes

*Special Master's Letter of Transmittal of Correction
Sheet Amending Report.*

have been made and should be endorsed in the copy sent to you. Annexed is the correction sheet.

The following issues remain for argument:

1. On Page 22 of the report it is stated that Simon's records would not reflect the payments of the renewal premiums to the company. From the record it is clear that renewal *premiums* were sent directly to the company in Massachusetts and subsequently it sent the renewal *commissions* to Simon in New York. From this I inferred that there was no way that Simon's New York record could reflect details concerning the receipt of premiums as contrasted to the payment of the commissions. This inference has been challenged and the question arises whether it is adequately supported in the record or whether additional evidence needs to be received in order to clarify the point.

2. The Trustee has made reference to a loan in the amount of \$8,400 in December of 1967 as being a part of this case. The Third National Bank has responded that this was an entirely new note and new loan. The record (pages 203 and 206) supports this claim. However, there is some \$4,600 apparently not repaid on that loan. The record is unclear as to whether that amount is included in the total claim of the Third National Bank and, if so, whether it should be treated any differently in the disposition of the funds.

3. The Trustee continues to argue that it is necessary to determine whether the attempted UCC filings are voidable under § 70(e) of the Bankruptcy Act, despite my conclusions that the filings were unnecessary. I confess that I am unable to understand the point that the Trustee is attempting to make and I would like to hear further argument.

*Special Master's Letter of Transmittal of Correction
Sheet Amending Report.*

Argument on the foregoing three points will be had on Monday, February 25th at 4 p.m. in Room 502 of this Courthouse. The unresolved points seem to concern only the Trustee and the Third National Bank of Hamden County, however if counsel for any other party wishes to be present at that time they are invited to attend.

Very truly yours,

GERARD L. GOETTEL
Gerard L. Goettel
United States Magistrate

GLG/fmk
Attachment
CORRECTION SHEET

Page 2—2d ¶—2d sentence should read:

“This proved impossible for a variety of reasons, but a stipulation was prepared covering the basic facts.”

Page 4—1st line—close parentheses after the word “action”.

Page 9—2d ¶—last sentence should read:

“This decision was affirmed on appeal without opinion on October 19, 1972.”

Page 12—1st full ¶—3rd line—the word “deliniate” should be corrected to “delineate”.

Page 14—1st line—the word “as” should be corrected to “an”.

*Special Master's Letter of Transmittal of Correction
Sheet Amending Report.*

Page 15—1st ¶—2d sentence should read:

“Including interest accrued on their notes to April 26, 1973, the amount claimed against the fund is \$178,804.09.”

Page 15—1st ¶—last sentence—the word “is” should be corrected to “in”.

Page 15—2d ¶—4th line—the word “judgment” should be omitted.

Page 16—2d line after the phrase “Trustee argues that the” remaining portion of the sentence should read:
“ . . . claim of the bank is fraudulent under the Bankruptcy Act, Section 67d and the Debtor and Creditors Law of New York, Section 270 et seq.”

Page 17—3rd line should read:

“the security assigned credits due from a Massachusetts . . .”

Page 18—Add footnote after 1st line “Section 9-102(1)” as follows:

“* Which applies unless Section 9-103 is applicable—see pp. 20-26 *infra*.”

Page 19—5th line—add after “(2d full paragraph)” the following:

“although elsewhere he argues differently.”

Page 20—1st ¶—5th line—correct “necessary” to “unnecessary”.

*Special Master's Letter of Transmittal of Correction
Sheet Amending Report.*

Page 20—1st ¶—7th line—add comma after “passed”.

Page 23—last line—correct “(September 26, 1962)” to
“(September 27, 1964)”.

Page 24—Add footnote after the words “prior year.” In
the fourth line as follows:

“* A separate transaction occurred on December
6, 1967 when \$8,400 was loaned on a new note of
which \$3,838.57 was repaid.”

Page 26—1st line—add the word “allegedly” after the
word “Bank’s”.

Page 43—8th line—the word “dean’s” should be corrected
to “deans”.

Page 45—2d ¶ under the topic “Conclusion”, #2 add the
following phrase at its conclusion:

“ . . . and other monies collected on the judg-
ment”.

Special Master's Supplemental Report.

On January 30, 1974, pursuant to Rule 53(e)(5) of the Federal Rules of Civil Procedure, a draft of the Special Master's Report in this action was sent to all counsel. Counsel's comments were solicited and an opportunity for further argument and briefing was extended.

As a result of comments and corrections submitted, a number of clerical corrections and minor changes were made. These were forwarded to counsel by letter of February 20, 1974. These corrections have been embodied in the draft of the report which is now being filed as a final report on this action.

With respect to certain issues involving the claims of the Third National Bank (covered on pages 15-26 of the original report), further argument was held and authorities submitted. This supplemental report covers the points raised at that supplemental hearing.

Records of Payments of Renewal Premiums

The Trustee has objected to the conclusion on page 22 of the original report that Simon's records did not reflect the payment of renewal premiums to the company on policies previously sold by him. Simon testified that his records were kept in Massachusetts and New York. When asked which records he kept in New York, he listed a number of types of records and did not mention records concerning renewal premiums. Renewal premiums were not collected by Simon, but were submitted directly by policy owners to the company in Massachusetts. Thereafter, the company periodically sent renewal commissions, based upon renewal premiums received, to Simon. The inference is clear that Simon's records did not contain the details concerning the receipt by the company of the renewal premiums, but would only reflect his receipt of renewal commissions during the period that he was receiving them.

Special Master's Supplemental Report.

(Which was prior to March 26, 1967, when the Bank exercised its rights with respect to the security and directed that the renewal premiums be sent directly to it.)

The Trustee has challenged the correctness of this inference concerning the absence in New York of any records showing renewal premium payments to the insurance company in Massachusetts. However, he has been unable to provide any evidence to the contrary. He was offered the opportunity to reopen the proceedings for presentation of additional evidence in the event he could represent to the Court that he had evidence establishing this fact. He has not made such an application, and the time for making it has expired. Consequently, as the record stands, I still conclude that all of the records concerning receipt of renewal premiums were maintained in Massachusetts.

The \$8,400 Loan of December of 1967

Upon hearing additional argument and reexamining the record it appears that the new and separate loan of December, 1967 in the amount of \$8,400 stands on a different footing from the original renewed loan.

The loan of December, 1967 was made under most unusual circumstances. The last advance on the original loan was made on December 22, 1966. The final note was executed on June 17, 1963, at a time when the total outstanding indebtedness had been reduced to \$309,000. The loan matured one month later. Simon continued making payments on the overdue note until March 29, 1967, when he defaulted. Thereafter, the Third National Bank levied on its security interest in the renewal commissions, and the insurance company paid them directly to the Bank. When Simon went to the Bank in December of 1967 he was long in default on the note and had been divested of his interest in the renewal commissions. He apparently advised the Bank that he desperately needed \$8,400 for hospital and

Special Master's Supplemental Report.

medical expenses and asked them to help him out. (T. 137 and 188*). The Bank agreed to lend him this money and advised him that his renewal commissions would be applied against this new note before any payment was made on the larger note. (Third National Bank's Exhibit K). While this procedure may have been in conformance with the Bank's practice of last out-first in (T. 146-149), this practice cannot be said to be binding on any of the other parties in this action.

The Bank takes the position that this new loan was also secured by the assignment of November 10, 1938. (T. 153). It is true that the original assignment stated that it would secure *all* subsequent loans. However, the secured interest under this assignment had already been realized by the Bank. It is difficult to see where it acquired the unilateral power to, in effect, defer repayment of the original loan from its security and increase its secured loan by making an additional advance to the debtor. A number of actions were already pending against Simon and two of these were reduced to judgment later in the same month.

Moreover, most of the considerations which lead to the conclusion that no filings under the U.C.C. were required on the original note do not apply to the subsequent loan:

1. the U.C.C. was then in effect in both New York and Massachusetts;
2. the considerations set forth in the case of *In Re Appliance Packing and Warehouse Corp.* (page 23 of the original report) do not apply;
3. it was not a transfer of compensation of an employee since Simon, at that time, was no longer employed by Mass. Mutual and had even lost his rights

* All page references are to the hearing before the Magistrate on September 21-25, 1973.

Special Master's Supplemental Report.

to the renewal commissions by virtue of defaulting on the original loan.

Considering all of these circumstances, the Bank does not have a preferred or secured position as to the \$8,400 and the \$3,888.57 of renewal commissions subsequently received should have been credited to the earlier loan. The Bank is merely a general creditor as to the \$8,400 loan, and the Conclusion with respect to monies to be paid to it must be adjusted accordingly.

Interest Rate on Note

In the Conclusion of the original report, the Bank was awarded interest at a rate of $5\frac{1}{2}\%$ from the commencement of the interpleader to the date of payment (see page 46). This was based upon the testimony of a Bank witness that the interest rate, at the time of the last note, was $5\frac{1}{2}\%$. (T. 185). However, the note specified no particular rate of interest and speaks of only "legal interest". After the note matured and was in default, the Bank charged interest based upon primary rates. (T. 185 and 218). The witness did not testify as to the primary rates in force but instead simply testified to a daily interest amount (\$24.16 per day). (T. 173). The Bank's transcript of the account (Third National Bank's Exh. L), however, indicates that on September 2, 1966 the rate was increased to $6\frac{1}{2}\%$. Consequently, interest will be allowed at that rate.

Attorneys Fees

At the rehearing the Third National Bank's attorneys argued, for the first time, that they were entitled to their attorneys' fees under the agreement with Simon. This claim is untimely and not within the issues previously tendered to the Court. It will not be considered at this time. Moreover, it is apparent that the large attorneys' fees

Special Master's Supplemental Report.

expended by the Bank in this interpleader action were not caused by Simon but by the presence of other claimants to the fund. These are not the usual collection costs against a defaulting debtor. It appears highly doubtful that they would have been allowable even if a timely claim for them had been made.

Conclusion

This Supplemental Report will be filed with, and made a part of, the Special Master's Report. The final page (46) of the original report has been amended and a copy of the amended page has been sent to all counsel.

GERARD L. GOETTEL
Gerard L. Goettel
United States Magistrate

Dated: New York, N. Y., March 11, 1974

Special Master's Supplemental Report.

the year 1970 remaining after the above distribution.

4. to Simon, any floor plan payments accrued after January 1, 1971, remaining after the above deductions.

*Credits for Renewal Commissions
Accruing Since January 1, 1973*

Any credits for renewal commissions which have accrued to the account of Simon since January 1, 1973, should be distributed as follows:

1. to the Third National Bank of Hampden County, an amount computed as follows: \$144,335.45, plus interest at the rate of $6\frac{1}{2}\%$ from May 12, 1970 to date of payment, less the \$157,762.17 paid as described above.
2. to the Trustee, any sums remaining after making the above payment.

GERARD L. GOETTEL
Gerard L. Goettel
United States Magistrate

DATED: New York, N.Y.
January 30, 1974

Objections of Third National Bank to Master's Report.

PLEASE TAKE NOTICE that the defendant, Third National Bank of Hampden County ("Third National") objects to the report of Gerard L. Goettel, Special Master, dated January 30, 1974, as supplemented March 11, 1974, in the following particulars:

1. On page 16 of the report dated January 30, 1974 in setting forth the contentions and allegations of the Trustee in Bankruptcy, the Master erred in omitting the word "allegedly" before the words "become insolvent" on the first line thereof, because there was no such finding of fact made by the Master.

2. In the Supplemental Report dated March 11, 1974, the Master erred in finding that because the new loan of December 1967 was made after the UCC went into effect in both New York and Massachusetts and because Simon was no longer employed by Mass. Mutual at that time, it was an unsecured loan.

(a) This finding is erroneous because during February and March of 1970 Third National filed in New York and Massachusetts appropriate Uniform Commercial Code forms (UCC-1) which secured such loan of December 1967 at the time of such filings.

3. The Master erred in his Supplemental Report dated March 11, 1974, in not considering and finding that the Third National was entitled to reimbursement for its attorneys fees under its agreement with Simon. The Master should have found that the Third National was entitled to be reimbursed for its attorneys fees and expenses through December 31, 1973, in the amount of \$31,725.21.

Defendant moves the Court to take such action on these objections and on the report of the Master, as supplemented, as may be just and proper under the circumstances.

Dated: New York, New York, April 15, 1974.

BLEAKLEY, PLATT, SCHMIDT & FRITZ
Attorneys for the defendant,
Third National Bank of Hampden County

Extracts From Testimony.

[The following testimony was adduced before Honorable Marvin E. Frankel, U.S.D.J.]

Direct Examination of Lawrence E. Simon by Mr. Lowe:

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(19) Q. Mr. Simon, do these schedules accurately reflect your financial condition as of July 21, 1970? A. Yes, sir. Did you say July 21, 1970? All right.

Q. I direct your attention particularly to the schedule entitled, "Summary of Debts and Assets". You tell the Court what your assets were and what your liabilities were as reflected in that schedule. A. You want me to read them individually?

Q. In July of 1970.

The Court: You may read it off. It's in evidence. Why don't you go ahead?

Mr. Lowe: The Summary of Debts and Assets, your Honor, reflects assets of \$1,500,000 and liabilities of \$1,189,815, your Honor.

Q. Mr. Simon, included among the assets which you list in that schedule, is there a claim asserted by you against a corporation known as Pension Corporation of America? A. Yes, sir, there is.

Q. Do you know the amount of that claim? A. I can refresh my memory from that schedule.

The Court: Mr. Lowe, you have got an exhibit in evidence and I am going to have you put in a post-trial memorandum telling me what you have taught me with these exhibits. I don't think you need to waste time going through

Simon—Direct.

(66) Q. Where were your records maintained with respect to the conduct of your business? A. My personal records?

Mr. Platt: Your Honor, I object to that. I don't see that it's relevant here.

* * * * *

(67) A. In two places. In my office at 320 Park Avenue, and also at the home office of the Massachusetts Mutual, Springfield, Massachusetts.

Q. What records were maintained here in New York? A. Well, my permanent records consisted of the amounts of commissions due me from the company and paid month by month, and the amounts of insurance sold, and the usual details concerning the policies that were sold by my salesmen.

* * * * *

(72) Q. Did you ever have occasion to discuss your financial situation with the Third National Bank?

* * * * *

A. Yes, sir.

Q. When for the first time did you have any such discussion? A. 1938.

* * * * *

Q. Did you have any such discussion in or about the year 1968?

* * * * *

(73) A. No, sir.

Q. You never discussed your financial condition with Third National Bank or an officer thereof? A. With the exception—

Q. In 1968.

Mr. Platt: Wait a minute. He's answered that question. He said he had none in 1968.

The Court: He is asking him again. I will allow it.

Simon—Direct.

A. May I answer, your Honor?

The Court: Yes.

A. I may have telephoned the bank to verify the amount of the balance I owed but that's about all.

Q. Did they ever make any demand upon you for money in the year 1968? A. No, sir.

Q. They never asked you for money in 1968? A. No, sir.

Q. Did they ever make any demand upon you for money at any time subsequent thereto? A. No, sir.

Q. Never asked you for money? A. No. Except through a lawsuit, of course. Except through one of these lawsuits against me.

(74) Q. Tell me about that lawsuit. A. You have the papers here about it, haven't you? Third National Bank against Lawrence E. Simon?

Q. Is that an action separate from the one we are presently involved in? A. No, it's part of this one.

Q. That was the first time they ever asked you for money? A. Yes, the first time they ever demanded money because I always paid back.

Q. Were you ever in default in your obligation to the Third National Bank?

Mr. Platt: I object to that, your Honor.

The Court: I will allow it.

The Witness: May I answer it?

A. I made periodic payments as long as I could until my accounts were restrained in 1968. Then I couldn't any more.

Q. After that they never asked you for money? A. No, sir.

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Simon—Direct.

(79) Q. What firm is that? A. Was it Platt, Bleakley and something else, the law firm? And he asked if I had received an envelope with a form in it. I said, "Yes, I just came in." "Will you please be sure when you sign it to return it to us?"

I said, "Very well," and then he said to me something like this, I don't remember the exact words but as near as my best recollection, he said, "Now, don't you go through any bankruptcy proceeding for the next four months." And so I was a little bit surprised at that. I didn't know what he had in mind so I said, "Very well," and I hung up.

Then I opened my mail and this was in it.

Q. This document was in it? A. Was in one of the envelopes.

Q. Was there a firm title on the envelopes that were received or the envelope that was received? A. Yes, I believe there was, Mr. Lowe, but I don't want to tell you, not under oath, exactly I am sure the name on the envelope.

Q. Give us your best recollection. A. My best recollection was the name of Platt, (80) Bleakley and somebody else, the lawyers.

* * * * *

(81) * * * Q. What did you do with the envelope? A. I threw it away I suppose, when I got through with it.

Q. What happened to Exhibit D? A. Well, I called up my attorneys the next day to (82) make an appointment to discuss that paper with them. I don't think I could get to Mr. Arutt for a day or two, and I went to see him. I told him I had this form and asked his advice whether I should sign it. And I remember him asking me, "Lawrence, do you owe the money?" I said yes. He said, "Well, then why shouldn't you sign if you owe the money?"

So I signed it at his desk and mailed it back.

Q. Did you in fact delay the filing of your petition for more than four months?

Mr. Platt: I object to the form of that question, your Honor.

The Court: Sustained.

Q. I show you another paper, Mr. Simon, the second page thereof bears a notation at the bottom, Form 185; and there is a certificate of the Secretary of the Commonwealth of

Simon—Direct.

Massachusetts affixed to it, to go with another form denominated "Financing Statement Form UCC-2." Would you look at the second and third page and tell me if they bear your signature? A. That's my signature and so is this, sir. That's my signature, both of them.

Q. Will you tell us please, under what circumstances you signed the second and third page of the document I just showed (83) you? A. I asked my attorneys, whose names I just mentioned, whether I should sign it. They said yes, so I signed it.

* * * * *

(85) Q. Mr. Simon, I show you this paper which bears the caption, "Supreme Court of the State of New York, County of New York," which is described as an affidavit, and I direct your attention to the last page thereof. Does that paper bear your signature? A. Yes, sir, that's my signature.

Q. Was it sworn to before a notary public? A. Apparently so, yes, sir.

Q. On what date?

Q. 16th day of—it's got May but it's something written over May, May is right is it, it's May and then June is written over it, 1970.

Q. Is that when you executed this paper? A. I don't know from memory. I would assume so.

Q. Well, it bears a notarial stamp, Maurice A.M. Edkiss. A. That's right.

Q. Do you recall signing that in the presence of Mr. Edkiss? A. I probably did.

Q. How did you get this paper? A. I don't remember this minute, Mr. Lowe. Probably (86) through the mail. I don't know.

Q. From whom? A. I don't remember.

Q. What did you do with it after you signed it? A. I sign nothing without being advised by my attorneys to sign it and then I return it to whoever sent it to me.

Simon—Direct.

Q. Did you get this from Mr. Edkiss? A. No, Mr. Edkiss had been one of my attorneys drafting a will, and when I couldn't get Mr. Arutt one day I went to his office, he took my acknowledgement, I signed it in his office.

Q. This affidavit was executed apparently in June of 1970. Isn't it a fact that at that time Mr. Edkiss was your attorney in this interpleader action? A. I don't remember that.

Q. Are you certain that this was not prepared by Mr. Edkiss? A. I can't be certain, I don't know.

Q. May I direct your attention to the back on this paper. A. Yes, sir.

Q. Is there a name of a law firm attached to that back? A. Yes, there is, sir.

(87) Q. What is the name of that firm? A. Bleakley, Platt, Schmidt, Hart and Fritz.

Q. Does that refresh your recollection as to whom you received that from? A. I could have received it from them. Frankly, I don't remember the names Hart and Fritz but I remember the name Bleakley, Platt, etc., etc.

Q. Do you recall ever speaking to Mr. Platt before today? A. Perhaps once or twice on the telephone some years back.

Q. Under what circumstances? A. Well, I think the one conversation I recall was about signing that form you showed me first.

Q. Any other conversation with him? A. Nothing that I can recall this man.

Q. Did you call him or did he call you? A. Oh, he called my house. Called me at my house.

Q. Do you recall what the substance of the conversation was? A. I have already repeated it for you. He asked if I had received an envelope.

Mr. Platt: Now, your Honor, he says he already has given it once.

• • • • •

Simon—Cross.

(90) Mr. Platt: I would like to develop it just—we have—one of the major questions that your Honor raised at the outset of the hearing today is I think involved in this testimony.

The Court: Well, tell me what it is. From whom it is a secret, the witness?

Mr. Platt: I would prefer to develop my—yes, your Honor.

The Court: Come to the side bar. I have to make rulings and I can't make them in the dark this way.

(At the side bar.)

Mr. Platt: I would like to develop that this witness was in Massachusetts on a monthly basis and he was there in connection with this loan. This is on the conflict question.

The Court: Can't we stipulate that the loan was transacted in Massachusetts, can we or can we not?

Mr. Lowe: I would so stipulate.

The Court: Then you don't need to develop it.

(In open court.)

Mr. Platt: First mark this for identification, please, as Third National Exhibit A.

(Third National Exhibit A marked for identification.)

• • • • •

(103) Q. You only remember opening one envelope? A. I said one envelope from you.

Q. One envelope from me? A. I had four or five letters that same day. Inside I saw that form. I tried to make an appointment with Mr. Arutt. I didn't succeed for a day or two. I have already testified I went to see him. He asked me if I owed the money. I said yes. He said, "All right, sign it."

Simon—Cross.

Q. On that occasion did you relate the conversation that you said you had with me to Mr. Arutt at that time?

Mr. Lowe: Objection, your Honor.

The Court: No, I will allow it.

A. I don't know what you are referring to. Did I repeat your conversation, you mean, to him?

Q. Yes. A. I don't remember whether I did or not. It's so long ago.

Q. You are sure that it was after this conversation you say we had on March 9th or so, that you went to see your attorney and not before? A. I went to see Mr. Arutt at least three or four times a week for many months.

Q. Well, now, I am trying to get at with respect to your receipt of this form, Trustee's Exhibit D.

* * * * *

(115) * * * Q. Can we not agree, Mr. Simon, that you received more than one set of forms from me to be signed which you (116) signed and returned to me? A. Yes, I think I have already stated there were two occasions.

Q. At least two? A. I think so.

Q. And you would agree with me now would you not, that we had more than one telephone conversation? A. No, sir, we may have had. I have said that before, but the reason I only recall one is that it stands out so distinctly in my mind that you said to me over the phone, "Don't take any—don't file a petition in bankruptcy for the next four months." I was so surprised by that remark that that's the one conversation that I didn't forget.

Q. You were surprised because you didn't think there was any possibility of your going into bankruptcy, isn't that a fact? A. Can I answer that question, your Honor?

Q. Isn't that the fact? A. The fact is I had no such thought in mind at all.

* * * * *

Simon—Cross.

(118) Q. Now, is it still your testimony, Mr. Simon, that you never discussed that affidavit with me before you signed it? A. I have no recollection of it.

Q. I see. A. I may have done so but I don't remember now.

(Defendant Third National Bank's Exhibits G and H marked for identification.)

Q. Mr. Simon, would you look again at Exhibit E in evidence which I think you testified was your signature and was a copy of a letter you mailed to me. A. I believe that's right.

Q. Would you look here at Exhibit H for identification, and advise me whether you recall receiving that letter in reply thereto? A. I do not presently at the present recall receiving this. I don't know. I may have gotten it, I don't recall it. I receive so many dozens every week I forget a few of them.

Q. Do you have any of your files at home? A. Some few papers, yes.

Q. Do you remember our correspondence? A. The only copies I have that relate to my indebtedness for the bank are primarily letters from (119) Mr. Bunton who would periodically write me and tell me what the balance was that I owed them or how much money the Massachusetts Mutual was holding in escrow.

Q. What did you do with my letters to you, Mr. Simon? A. At that time my files were and still are in the offices of Arutt, Nachamie, Benjamin & Rubin.

Q. They are in the offices of your attorneys? A. I think so but they are not my present attorneys.

* * * * *

Bunten—Direct.

Direct Examination of Kenneth Bunten, Assistant General Counsel of the plaintiff, Mass. Mutual, by Mr. Lowe.

(175) Q. I ask you again how much was the insurance company holding in the month of January 1968.

Mr. Post: Is that during or at the end of?

Mr. Lowe: At the end of the month. I don't care.

Mr. Post: It is quite important.

Mr. Lowe: You tell me how I ought to ask it.

Mr. Post: Because it depends on when these premiums are remitted. Until they are remitted there is no commission renewal due.

The Court: All right, you want it as of January 31, 1968?

Mr. Lowe: Or whatever date that Mr. Post suggests is the appropriate date, your Honor.

Mr. Post: I would suggest as of the end of these different months, your Honor, as the easiest way to look at this.

(176) The Court: All right, thank you, Mr. Post. We will follow that.

Give it to him as of the end of January 1968.

Mr. Platt: I question whether all this is relevant, your Honor.

Bunten—Direct.

The Court: Why is it relevant, Mr. Lowe?

Mr. Lowe: If your Honor pleases, levy was made by Auerbach, and I believe it was on January 10, 1968.

I am trying to ascertain the extent of the levy that was made by the judgment creditor. I want to know how much it was that he levied on in order to determine the extent of that levy.

The Court: The position being that the levy is what perfects the lien and the measurement of—

Mr. Lowe: That's correct and I respectfully direct your Honor's attention—

The Court: I understand. I will allow you to elicit it and we will argue the law later. It sounds like a certainly plausible position and based on what I have heard, I am not sure whether it's correct or not. Mr. Robins may have views about it but I will let you elicit the evidence.

A. At the end of January 1968 we had in escrow, Massachusetts Mutual had in escrow, commissions payable (177) under Mr. Simon's general agent's contract and payable under personal contracts between Mr. Simon and general agents subsequent to him, a total of \$7,606.85.

Q. Am I correct then in stating that at the time the levy was made on the bank, on the insurance company, there was approximately \$7,000?

The Court: Oh no, of course you are correct. That's what he just told you. Now, Mr. Lowe, I am pressuring you and cajoling you and using whatever other devices are at my disposal to help me move with dispatch. One way you won't help me is by repeating the answer to the question and ask if that's correct.

Ackerman—Redirect.

Next question.

Q. Now, are you aware of the fact that the interpleader action was started on May 12, 1970? A. Yes.

Q. How much money was being held in each of the accounts you described?

Mr. Robins: That's been stipulated to, your Honor.

The Court: You are a party to that stipulation, Mr. Lowe, yes?

Mr. Lowe: That is the fact, your Honor, right.

* * *

[The following testimony was adduced before Honorable Gerard L. Goettel, Magistrate.]

Redirect Examination of Joan M. Ackerman, an officer of the Third National Bank, by Mr. Platt.

(198) * * *

By Mr. Platt:

Q. Now Mrs. Ackerman, directing your attention to 1938 when this loan was first taken out, what was the term of time on the first loan? A. Six months.

Q. And at the end of this six-month period, at the end of that term—

Mr. Lowe: If your Honor please, that exhibit reflects that, I object on the ground that the exhibit speaks for itself.

The Magistrate: He has not completed his question.

Q. (Continuing) At the end of the six-month term what if anything was done with respect to the note that was executed by Mr. Simon with respect to the first loan?

Ackerman—Redirect.

Mr. Lowe: I object, your Honor. May I conduct just a brief voir dire with respect to that?

The Magistrate: Yes.

(199) By Mr. Lowe:

Q. With respect to the last question put to you, does the exhibit you are consulting reflect the answer to the question that was put? A. Yes.

Mr. Lowe: I would object, your Honor. The exhibit speaks for itself.

The Magistrate: Would it be understandable to me without explanation?

The Witness: Possibly not, your Honor.

The Magistrate: I overrule the objection.

Mr. Platt: Would you read the question, please. (Question read.)

A. The loan was renewed.

By Mr. Platt:

Q. And how was that done physically? A. A new note—a new piece of paper is signed by the customer for another stated period of time.

Q. And is that true in every case, at the end of every term from 1938 on, at the end of each term of renewal? A. Yes, a loan is written on a time basis, (200) such as this large note, yes.

Q. And was that large note written on a time basis in every instance from 1938 down to date? A. Yes, it was.

The Magistrate: Let me stop you to make sure I understand what is meant by a "time basis."

Ackerman—Redirect.

Was the borrower making periodic payments on this or was the amount continuously outstanding?

The Witness: He was making payments but it could be renewed without payment, if that was the agreement. It is not a demand note. It is for a stated period of time.

The Magistrate: I understand that, but is he called upon to make periodic payments from the date he takes the note out until it is payable?

The Witness: No, it is due in full on the maturity date, to either renew it or pay it off.

The Magistrate: So in some instances he made partial payments, and in other instances he did not?

The Witness: That is correct.

The Magistrate: Proceed.

Q. Were there successive time notes from 1938 on down to 1963?

(201) Mr. Lowe: I object to the form of the question, your Honor. This witness is being led.

Mr. Platt: The question is whether there were or not.

The Magistrate: Overruled.

(Question read by the reporter.)

A. Yes, there were.

Q. Were they all of the same period of time or were they a different period of time? A. I would have to look at every transaction, but they could be for varied amounts of time.

The Magistrate: Find out first if they were. If you can find one or two instances don't go any further.

The Witness: (After examining) Some of them were written for shorter periods of time.

Ackerman—Redirect.

Q. Were there any written on a demand basis with respect to that original loan? A. None on the original note, no.

Q. And at the end of, say, the first period of time, the first six months, was any new money—and by “new money” I mean additional new money over and above the \$75,000 advanced? A. On the very first note to the maturity?

(202) Q. At the end of the first six months. A. No, no new money was advanced.

Q. So at the end of the first six months a new note was signed for an additional period of time, is that correct?

Mr. Lowe: I object to that.

Q. (Continuing) Without any additional money being advanced?

Mr. Lowe: I object to that.

The Magistrate: Sustained.

Q. When was the first additional new money advanced, Mrs. Ackerman, after 1938? A. November of 1941.

Q. And how many new notes had been signed by that time, according to that note, according to that ledger sheet?

Mr. Lowe: I object, your Honor.

The Magistrate: To the word “new”?

Mr. Lowe: Yes.

Q. Renewal notes.

The Magistrate: How many additional renewal notes were signed?

The Witness: There were several. Do you want me to count them?

* * * * *

Pages 147a—150a

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EXCERPTS FROM SUPPLEMENTAL TRIAL MEMORANDUM OF ROBERT S. SCHINDLER, AS TRUSTEE IN BANKRUPTCY OF LAWRENCE E. SIMON, BANKRUPT, INTERVENOR.

This supplemental trial memorandum is submitted on behalf of Robert B. Schindler, as Trustee in Bankruptcy of Lawrence E. Simon, bankrupt, intervenor.

* * *

POINT II

IF THE LIEN OF STUART IS A VALID ONE, THEN IT IS VALID ONLY TO THE EXTENT OF \$7,606.85.

Stuart entered a judgment against Simon in the United States District Court for the Southern District of New York on December 27, 1967, and on January 9, 1968, the judgment was docketed in the office of the Clerk of the Supreme Court and County of New York. A transcript of this judgment was issued, following which executions were delivered by Stuart to the Sheriff of the City of New York, New York County Division (Stipulation of Fact No. 19). On or about January 19, 1968, Mass. Mutual was served with an execution and Sheriff's levy by the Sheriff of the City of New York, New York County Division, on the Stuart judgment (Stipulation of Fact No. 20).

From March, 1967, through the month of December, 1967, Mass. Mutual remitted Simon's renewal commissions to Third National (S.M. 4/27/73, p. 171; S.M. 9/21/73, p. 43). Beginning in January, 1968, Simon's renewal commissions were escrowed by Mass. Mutual (S.M. 4/27/73, p. 174). As of December 31, 1967, Mass. Mutual was not holding in any form any commissions that were due to Simon, everything having been remitted to Third National (S.M. 4/27/73, pp. 174-175). Renewal commissions were payable on a monthly basis usually at the end of the month, and renewal commissions were never accumulated beyond a month's time

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(S.M. 4/27/73, pp. 172-173; S.M. 9/21/73, pp. 30-31). At the end of the month of January, 1968, Mass. Mutual was holding in escrow a total of \$7,606.85 in renewal commissions payable to Simon under his general agent's contract (S.M. 4/27/73, pp. 176-177). Thus, when Stuart caused a levy to be made on Mass. Mutual on or about January 19, 1968, Mass. Mutual was holding a maximum of \$7,606.85 of Simon's renewal commissions.

Paragraph 10 of the general agent's agreement entered into between Simon and Mass. Mutual on July 1, 1932, provides:

"That any commissions to which General Agent may become entitled under any provision of this contract shall accrue only as the premiums on which such commissions are to be reckoned are collected and paid over as herein provided; . . ."

A renewal commission became due to Simon when the premium for which a commission was paid was paid to Mass. Mutual (S.M. 4/27/73, p. 172). Until a renewal premium was remitted, there was no renewal commission due to Simon (S.M. 4/27/73, p. 175). Only if the renewal premium was paid, would Simon get a commission—if there were no payment, there was no commission (S.M. 9/21/73, pp. 31-32, 47). The Court recognized that renewal commissions are based upon the contingency of payment of future premiums by policyholders (S.M. 9/21/73, pp. 36, 38).

As hereinabove mentioned, the sum of \$7,606.85 being held in escrow by Mass. Mutual at the end of January, 1968, represented renewal commissions payable to Simon under his general agent's contract (S.M. 4/20/73, pp. 176-177). Thus, when Stuart caused a levy to be made on Mass. Mutual on or about January 19, 1968, no lien was created on

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any payments due Simon under the Floor Plan Agreement with Mass. Mutual (Exhibit C to the complaint).

On December 31, 1962, the general agent's agreement (Exhibit A to the complaint) was terminated, and on September 16, 1964, Simon executed a Floor Plan Agreement with Mass. Mutual (Exhibit C to the complaint), pursuant to which Mass. Mutual agreed to make certain payments to Simon (Stipulation of Fact, No. 15). Paragraph 2 of the Floor Plan Agreement provides:

"If, after the termination of the Contract and during the lifetime of the General Agent, the amount of the General Agent's Commissions during the twelve report month period immediately preceding any anniversary of the date of such termination shall be less than twenty-seven thousand eight hundred eighty-eight dollars (\$27,888), the Company will pay to the General Agent on the first day of the next succeeding calendar month (hereinafter referred to as 'Commencement Date') the difference between such amounts; . . ."
(Emphasis added)

Paragraph 5 of the Floor Plan Agreement provides:

"This Agreement shall terminate on:

- (a) the death of the General Agent; or
- (b) violation by the General Agent of the provisions of Paragraph 2(b); or
- (c) revocation by the Company as of any anniversary of the date of termination of the Contract."

Since Simon's general agent's agreement terminated on December 31, 1962, the anniversary date of such termina-

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tion under paragraph 2 of the Floor Plan Agreement during any year in which the Floor Plan Agreement was effective would be December 31. Any payments that might become due to Simon under the Floor Plan Agreement would be payable to him "on the first day of the next succeeding calendar month," to wit, January 1. Thus, January 1 would be the "commencement date" of payment under the Floor Plan Agreement. In order to be entitled to any payments under the Floor Plan Agreement, Simon would, under paragraph 2 thereof, have to be alive on January 1. Only if Simon were alive would he continue to accrue benefits under the Floor Plan Agreement (S.M. 9/21/73, p. 73).

Article 52 of the CPLR deals with "Enforcement of Money Judgments." CPLR § 5201(a) provides:

"§ 5201. Debt or property subject to enforcement;
proper garnishee.

"(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, *certainly* or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state." (Emphasis added)

In commenting upon CPLR § 5201(a), it is stated in 6 *New York Civil Practice*, Weinstein-Korn-Miller, at page 52-13:

"Perhaps the question most frequently litigated in disputes relating to the propriety of enforcing a judg-

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ment against a particular debt is whether the debt is certain. Any obligation to pay for services actually performed or any obligation that is matured at the time the judgment creditor seeks to enforce his judgment against it satisfies the certainty requirement. *If there are any unfulfilled conditions to the judgment debtor's right to payment of the debt, the debt is not certain.* For example, it has been held that a percentage of profits contract was uncertain because of the possibility that the garnishee would not operate profitably." (Emphasis added)

In support of the last sentence of the above-quoted statement, Weinstein-Korn-Miller cite *Frederick v. Chicago Bearing Metal Co.*, 221 App. Div. 588, 224 N.Y.S. 629, where at page 630 of 224 N.Y.S. it is stated:

"There can, then, be no attachment of or levy upon a contingent right, which may or not become a cause of action according to the occurrence or nonoccurrence of a future event."

In *Herman & Grace v. City of New York*, 130 App. Div. 531, 114 N.Y.S. 1107, the court says at page 1110 of 114 N.Y.S.:

"It is well settled that an indebtedness is not attachable unless it is absolutely payable at present, or in the future *and not dependable upon any contingency.*" (Emphasis added)

Although the court in *Herman & Grace v. City of New York*, *supra*, had before it an attachment, the principle enunciated is equally applicable to an execution. *Frederick v. Chicago Bearing Metal Co.*, *supra*.

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The sound reason and rationale for the foregoing rule is stated in *176 East 123rd Street Corp. v. Frangen*, 67 Misc.2d 281, 323 N.Y.S.2d 737, 740, as follows:

“A lien cannot be elevated to a position superior to the interest to which it attaches. When voluntarily created it only attaches to such interest as the lienor has (*Sayles v. Best*, 140 N.Y. 368, 35 N.E. 636); and when involuntarily created, as by judgment, it is ‘a lien only upon the interest of [the] judgment debtor at the time the judgment was docketed’ (*Ptaszynski v. Flack*, 263 App. Div. 831, 31 N.Y.S.2d 599; *Eisenberg v. Mereer Hicks Corp.*, 199 Misc. 52, 55, 101 N.Y.S.2d 662, 665, *aff’d* 278 App. Div. 806, 104 N.Y.S.2d 804). Stated otherwise, the City’s right to the fund on deposit is no greater than was that of the landlord when the City made its expenditures.”

In *Glassman v. Hyder*, 23 N.Y.2d 354, 296 N.Y.S.2d 783, 786, the court says:

“A debt to be attachable must be ‘past due or * * * yet to become due, certainly or upon demand of the judgment debtor’ (CPLR 5201, subd. [a]). Where a duty to pay is conditioned on the creditor’s future performance, or upon contractual contingencies, there is no debt certain to become due (see *Sheehy v. Madison Sq. Garden Corp.*, 266 N.Y. 44, 47, 193 N.E. 633; *Herrmann & Grace v. City of New York*, 130 App. Div. 531, 535, 114 N.Y.S. 1107, 1111, *aff’d* 199 N.Y. 600, 93 N.E. 376).”

See also *Mobil Oil Corporation v. Lovotro*, 65 Misc.2d 729, 318 N.Y.S.2d 989, and *Suffolk Auto Liquidators, Inc. v. Eastern Auto Auction Inc.*, 343 N.Y.S.2d 806. At page 808

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of the last cited case, the court says:

" . . . intangibles are not subject to attachment or levy where they are of a contingent nature and may or may not become due depending upon future performance or the occurrence or nonoccurrence of a future event or other contractual contingency. (Sheehy v. Madison Square Garden Corp., 266 N.Y. 44, 193 N.E. 633; Frederick v. Chicago Bearing Metal Co., 221 App. Div. 588, 224 N.Y.S. 629; Hermann & Grace v. City, 130 App. Div. 531, 114 N.Y.S. 1107, aff'd 199 N.Y. 600, 93 N.E. 376)."

See also David D. Siegel, *Practice Commentary to CPLR* § 5201(a), McK 7B, § 5201(a), pp. 24-25, where it is stated:

"Subd. (a) governs debts and causes of action. Subd. (b) is sweeping in its language, and permits enforcement against 'any property which could be assigned or transferred'. If one were to give the word 'property' therein its broadest possible meaning, subd. (b) would make subd. (a) superfluous. If subd. (a) is to have any meaning, it would have to be construed as a modification, to the extent necessary, of subd. (b), and where the thing sought is a debt alleged to exist in favor of the judgment debtor, it is subject to levy only where it 'is . . . to become due, certainly or upon demand'. *That would eliminate from levy contingent debts not certain to become due to the judgment debtor.*" (Emphasis supplied)

It is precisely this problem which K. Robert Buntin, Jr., Assistant General Counsel of Mass. Mutual, had in mind when in his letter of January 10, 1968 to Simon (Trustee's Exhibit R in evidence) regarding the Geist restraining no-

*Excerpts from Supplemental Trial Memorandum of
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Lawrence E. Simon, Bankrupt, Intervenor.*


tice, he said:

“There is some question in my mind as to whether or not the restraining notice is effective *as to commissions coming due you in the future* so I would suggest that your attorney make every effort to lift the restraining notice or get a consent letter from the plaintiff’s attorney for us to pay over commissions falling due.” (Emphasis supplied)

His point was well taken, and is equally applicable to Stuart’s levy.

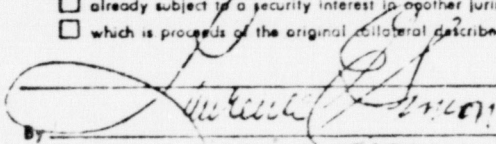
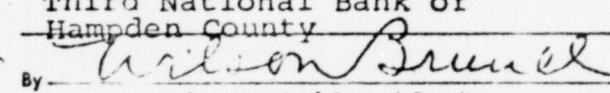
* * * * *

Exhibit, UCC Financing Statements.

(See opposite )

TRUSTEE'S EXHIBIT D

ONLY COPY AVAILABLE

This FINANCING STATEMENT is presented to a Filing Office for filing pursuant to the Uniform Commercial Code.		No. of Additional Sheets Presented:	Maturity Date 3. (optional):
1. Debtor(s) (Last Name First) and Address(es): Simon, Lawrence E. 40 Central Park South New York, New York and 303 Lexington Avenue New York, New York 10016	2. Secured Party(ies): Name(s) and Address(es): Third National Bank of Hampden County, a national banking association with its principal office in Springfield, Mass. 01101		4. For Filing Officer: Date, Time, No. Filing Office <div style="text-align: right; font-size: 1.2em;"> 1970 MAR 11 PM 1:56 70P. 6264 </div>
5. This Financing Statement covers the following types (or items) of property: Assignment of any and all renewal commissions due and payable to debtor under his contract with Massachusetts Mutual Life Insurance Company from and after November 10, 1938.			6. Assignee(s) of Secured Party and Address(es):
<input checked="" type="checkbox"/> Proceeds — <input type="checkbox"/> Products of the Collateral are also covered.			7. <input type="checkbox"/> The described crops are growing or to be grown on: * <input type="checkbox"/> The described goods are or are to be affixed to: * * (Describe real Estate Below).
8. Describe Real Estate Here:		9. Name(s) of Record Owner(s):	
No. & Street	Town or City	County	Section Block Lot
10. This statement is filed without the debtor's signature to perfect a security interest in collateral (check appropriate box)			
<input type="checkbox"/> under a security agreement signed by debtor authorizing secured party to file this statement, or <input type="checkbox"/> already subject to a security interest in another jurisdiction when it was brought into this state, or <input type="checkbox"/> which is proceeds of the original collateral described above in which a security interest was perfected.			
By  _____ Signature(s) of Debtor(s)		By  _____ Signature(s) of Secured Party(ies) Executive Vice President	
(1) Filing Office Copy — Numerical			

Nº 47824

STATE OF NEW YORK,
COUNTY OF NEW YORK }

I hereby certify that the annexed is a true copy of an instrument made by.....

LAWRENCE E SIMON

THIRD NATIONAL BANK OF HAMPSHIRE COUNTY

FILED

NEW YORK

XXXXXX
recorded in the office of the New York City Register..... County on the 11th

day of MARCH 19 70 at M, in Section Block

#70P6264

Liber of UCC'S Page

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal,

this 24th day of DECEMBER 19 71.

City Register

LAWRENCE E SIMON

to

THIRD NATIONAL BANK OF
HAMPDEN COUNTY

CERTIFIED COPY

City Register's Office,

County,

New York, N. Y.

Charges \$ 1.00

Application No. 340478

Prepared by A. I. .

For BLEAKLEY, PLATT, SCHMIDT

Address 120 BROADWAY, NYC

STATE OF NEW YORK
DEPARTMENT OF STATE

552

It is Hereby Certified, That the attached copy of Financing Statement between Simon, Lawrence E. & Third National Bank of Hampden County is a true copy of the ORIGINAL thereof filed in this office on March 16, 1970 at 3:00 P. M., file number 25,492, pursuant to the provisions of the Uniform Commercial Code for New York State.

WITNESS my hand and the official seal of the
Department of State at the City of
Albany, this 16th day
of February one thousand
nine hundred and seventy-two

John P. Lomenzo
Secretary of State

This Statement is to be filed in the County of _____ for the purpose of perfecting a security interest in the property described below.		No. of Streets	Amount owed	Maturity Date 3 (months)
1. Secured Party Name (Full and Complete) Simon, Lawrence E. 40 Central Park South New York, New York and 303 Lexington Avenue New York, New York 10016		2. Secured Party Name and Address(es) Third National Bank of Hampden County, a national banking association with its principal office in Springfield, Mass. 01101		4. For Filing Officer: Date, Time, Re-filing Office <div style="text-align: right;"> 2.00 3.00 4.00 16.00 25.00 </div>
5. This Statement is made under the following terms (or terms of property): Assignment of any and all renewal commissions due and payable to debtor under his contract with Massachusetts Mutual Life Insurance Company from and after November 10, 1938.				6. Assignee(s) of Secured Party and Address(es)
7. <input checked="" type="checkbox"/> The described goods are growing or to be grown on. <input type="checkbox"/> The described goods are or are to be affixed to. (Describe Real Estate Below)				
8. Describe Real Estate Here:				
<div style="display: flex; justify-content: space-between;"> <div> <input checked="" type="checkbox"/> Proceeds — <input type="checkbox"/> Products of the Collateral are also covered. </div> <div style="border: 1px solid black; padding: 5px; width: 300px;"> 9. Name(s) of Record Owner(s): </div> </div>				
No. & Street	Town or City	County	Section	Block
Lot				
10. This statement is filed without the debtor's signature to perfect a security interest in collateral. (Check appropriate box)				
<input type="checkbox"/> Under a loan agreement signed by debtor authorizing secured party to file this statement, or <input type="checkbox"/> Debtor's consent to a security interest in another jurisdiction when it was brought into this state, or <input type="checkbox"/> When proceeds of the original collateral described above in which a security interest was perfected.				
By <u><i>Lawrence E. Simon</i></u> Signature(s) of Debtor(s)		By <u><i>Arthur Brunel</i></u> Executive Vice President		
(1) Filing Office Copy — Numerical STANDARD FORM - FORM UCC-1 — Approved by John P. Lorenzo, Secretary of State of New York				

TRUSTEE'S EXHIBIT E

ONLY COPY AVAILABLE



John F. X. Davoren
Secretary of the Commonwealth

The Commonwealth of Massachusetts
Office of the Secretary
State House, Boston 02133

AUG 31 1971

A true Copy Witnessed under the Great
Seal of the Commonwealth of Massachusetts.

John F. X. Davoren

Secretary of the Commonwealth.

Michael J. Costello

Deputy Secretary.

THE FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code:

3 Maturity date (if any):

1 Debtor(s) (Last Name First, and address(es))
Simon, Lawrence E.
40 Central Park South
New York, New York
and 303 Lexington Avenue
New York, New York 10016

2 Secured Party(ies) and address(es)
Third National Bank of
Hampden County, a national
banking association with
its principal office in
Springfield, Mass. 01101

For Filing Officer (Date, Time, Number, and Filing Office)

623973

MAR 13 10 08 AM '70

4 This financing statement covers the following types (or items) of property:

Assignment of any and all renewal commissions due and payable
to debtor under his contract with Massachusetts Mutual Life
Insurance Company from and after November 10, 1938.

ASSIGNEE OF SECURED PARTY

Check ☒ if covered: ☒ Proceeds of Collateral are also covered ☐ Products of Collateral are also covered No. of additional Sheets presented:

Filed with: City Clerk, Springfield, Mass. and Secretary of State, Boston, Mass.

By: *Lawrence E. Simon*
Signature(s) of Debtor(s)

Filing Officer Copy — Alphabetical

Third National Bank of Hampden County

By: *William Brunel*
Signature(s) of Secured Party(ies) Exec. Vice Pres.

1. This form is designed to be used in the spring when filed with more than one office. Place this form over UCC-1.
2. Fill in the space provided for the filing officer's name and address.
3. Fill in the space provided for the secured party's name and address. Fill in the file number of the filing officer.
4. If the space provided for the secured party's name and address is insufficient, the secured party should be added on additional sheets, preferably 8" x 11" or 8" x 10". Only a copy of the additional sheet is required to be filed with a copy of this copy of the financing statement. In a schedule of collateral, indicate the additional sheets by referring to the page number of the secured party.
5. If collateral is to be provided by the secured party, indicate the real estate and give name of record owner.
6. When a copy of the financing statement is filed, the secured party should also file a copy of this form, without extra fee.
7. At the time of filing the financing statement, the secured party should also file a copy of this form, without extra fee. At a later date, secured party may date and sign the Termination Lien and use third copy as a return to the filing officer.

This FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code.

3 Maturity date (if any):

1 Debtor(s) (Last Name First, and address)
Simon, Lawrence E.
40 Central Park South
New York, New York
and 303 Lexington Avenue
New York, New York 10016

2 Secured Party (and address)
Third National Bank of
Hampden County, a national
banking association with
its principal office
in Springfield, Mass. 01101

For Filing Officer (Date, Time, Number, and Filing Office)
3-12-70:8:15 A M
City Clerks Office:Spfld
File 56956

4 This financing statement covers the following types (or items) of property:

Assignment of any and all renewal commissions due and payable
— to debtor under his contract with Massachusetts Mutual Life
Insurance Company from and after November 10, 1938

ASSIGNEE OF SECURED PARTY

Check ☒ if covered. ☒ If records of Collateral are also covered. ☐ Products of Collateral are also covered. No. of additional sheets presented:

Filed with City Clerk, Springfield, Mass. and Secretary of State, Boston, Mass.

By *[Signature]*
(Signature of Filing Officer)

Third National Bank of Hampden County

By *[Signature]*
Signature(s) of Secured Party, (Sec) Exec. Vice Pres.

Filing Officer Copy — Alphabetical

U.S. MAILING SERVICE FORM 185A

A true copy

Attest:

[Signature]

Asst. City Clerk

THIRD NATIONAL BANK'S EXHIBIT C-1

ONLY COPY AVAILABLE

~~DECLASSIFIED~~
2nd
note

ESSEX
S. DIST. COURT
S. D. OF N. Y.

RE
E } ss:

APR 26 1973

ied, That the attached copy of Financing Statement between

e E. & Third National Bank of Hampden County is a true

IGINAL thereof filed in this office on February 25, 1970

at 9:00 A. M., file number 155,491, pursuant to the provisions of the

Uniform Commercial Code for New York State.

WITNESS my hand and the official seal of the
Department of State at the City of
Albany, this 16th day
of February one thousand
nine hundred and seventy-two

John P. Lomongo
Secretary of State

This Financing Statement is presented to the Filing Office for filing pursuant to the Uniform Commercial Code.

No. of Assignments
Sheets Presented

Priority Date

1. Debtor(s) (Last Name First) and Address(es):

Simon, Lawrence E.
40 Central Park South
New York, New York
and 303 Lexington Avenue
New York, New York 10016

2. Secured Party(ies), Name(s) and Address(es):

Third National Bank of
Hampden County, a national
banking association with
its principal office in
Springfield, Mass. 01101

3. (Optional)

4. For Filing Officer, Date, Time, No. Filing Office

2.00 9.00 AM
FEB 25/70 155,491

245

5. This Financing Statement covers the following types (or items) of property:

Assignment of any and all renewal commissions
due and payable to debtor under his contract
with Massachusetts Mutual Life Insurance
Company from and after November 10, 1938.

6. Assignee(s) of Secured Party and Address(es)

☒ Proceeds —

☐ Products of the Collateral are also covered.

8. Describe Real Estate Here:

7. ☐ The described crops are growing or to be grown on.
☐ The described goods are or are to be affixed to.
• (Describe Real Estate Below).

9. Name(s) of
Record
Owner(s):

No. & Street

Town or City

County

Section

Block

Lot

10. This statement is filed without the debtor's signature to perfect a security interest in collateral (check appropriate box)

- ☐ under a security agreement signed by debtor authorizing secured party to file this statement, or
☐ already subject to a security interest in another jurisdiction when it was brought into this state, or
☐ which is proceeds of the original collateral described above in which a security interest was perfected.

By

Signature(s) of Debtor(s)

By

Signature(s) of Secured Party(ies)

(2) Filing Officer Copy — Acknowledgement

STANDARD FORM - FORM UCC-1 — Approved by John P. Lomenzo, Secretary of State of New York

THIRD NATIONAL BANK'S EXHIBIT C-2

ONLY COPY AVAILABLE

This FINANCING STATEMENT is presented to a Filing Officer
for filing pursuant to the Uniform Commercial Code.

No. of Additional
Sheets Presented:

Maturity Date

3. (optional):

1. Debtor(s) (Last Name First) and Address(es):

Simon, Lawrence E.
40 Central Park South
New York, New York
and 305 Lexington Avenue
New York, New York 10016

2. Secured Party(ies) Name(s) and Address(es):

Third National Bank of
Hamden County, a national
banking association with
its principal office in
Springfield, Mass. 01101

4. For Filing Officer: Date, Time, No. Filing Office

1970 11 20 P.M. 2:05

702 4705

5. This Financing Statement covers the following types (or items) of property:

Assignment of any and all renewal commissions
due and payable to debtor under his contract
with Massachusetts Mutual Life Insurance
Company from and after November 10, 1938.

6. Assignee(s) of Secured Party and Address(es):

7. ☐ The described crops are growing or to be grown on. *
☐ The described goods are or are to be affixed to. *
* (Describe Real Estate Below).

☒ Proceeds —

☐ Products of the Collateral are also covered.

8. Describe Real Estate Here:

9. Name(s) of
Record
Owner(s):

No. & Street

Town or City

County

Section

Block

Lot

10. This statement is filed without the debtor's signature to perfect a security interest in collateral
(check appropriate box)

- ☐ under a security agreement signed by debtor authorizing secured party to file this statement, or
☐ already subject to a security interest in another jurisdiction when it was brought into this state, or
☐ which is proceeds of the original collateral described above in which a security interest was perfected:

By _____

Signature(s) of Debtor(s)

By _____

Signature(s) of Secured Party(ies)

(2) Filing Officer Copy — Acknowledgement

STANDARD FORM - FOP** UCC-1 — Approved by John P. Lomenzo, Secretary of State of New York

Nº 47822

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. }

I hereby certify that the annexed is a true copy of an instrument made by _____

LAWRENCE E SIMON to _____

THIRD NATIONAL BANK OF HAMPDEN COUNTY

FILED

~~RECORDED~~ in the office of the New York City Register NEW YORK County on the 20th

day of FEBRUARY 19 70 at _____ M, in Section _____ Block _____

#70P4535

~~INDEX~~ of UCC'S Page _____

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal,

this 23rd day of DECEMBER 19 71.

Viola M. Rucio
 City Register

LAWRENCE E SIMON

to

THIRD NATIONAL BANK OF
HAMPDEN COUNTY

CERTIFIED COPY

City Register's Office,
NEW YORK County,
New York, N. Y.

Charges \$ 1.00

Application No. 340475

Prepared by A.M.

For BLEAKLEY, PIATT, SCHMIDT

Address 120 BROADWAY, NYC



159a

Objections to Special Master's Report, and Supplemental Report.

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, Intervenor in the above entitled action, by Sheldon Lowe, his attorney, objects to the Report of Hon. Gerard L. Goettel, Special Master herein, dated January 30, 1974, as corrected by letter dated February 20, 1974, and the Supplemental Report of said Special Master, dated March 11, 1974, which were filed in the office of the Clerk of this Court on the 11th day of March, 1974, and respectfully shows to the Court that in the several respects hereinafter mentioned, the Special Master has erred, to the prejudice of the Intervenor, the errors being specified as follows:

1. The Special Master erred at page 4 of his Report, as corrected, in that he failed to find that Simon kept records of both commissions and renewal commissions in New York City.
2. The Special Master erred at page 14 of his Report, as corrected, in finding that Simon's renewal commissions have an aspect of wages about them. This finding is inconsistent with the finding made by the Special Master at page 4 of his Report, as corrected, that Simon was not an employee of Massachusetts Mutual but was an independent contractor.
3. The Special Master erred at page 14 of his Report, as corrected, in concluding that assignments of renewal commissions, such as that in the case at bar, have been found valid by the courts. Moreover, the authorities cited by the Special Master do not support such conclusion, and the citation of New York authorities is inconsistent with the conclusion of the Special Master that Massachusetts law is applicable in determining the validity and perfection of such assignment.

*Objections to Special Master's Report, and
Supplemental Report.*

4. The Special Master erred at pages 15-16 of his Report, as corrected, in stating that the assignment was continued, and recorded pursuant to the U.C.C. The Third National Bank filed UCC-1 forms of Financing Statements in New York and Massachusetts. As the Special Master states at page 16, the Trustee contends that Third National Bank was required to file Continuation Statements and not Financing Statements. Assuming *arguendo* that that Third National Bank filed appropriate forms to perfect and continue its security interest in the renewal commissions, it is the Trustee's contention that the claim of the bank is fraudulent under Section 67d of the Bankruptcy Act and Section 270 et seq of the Debtor and Creditor Law of New York.

5. The Special Master erred at pages 16-17 of his Report, as corrected, in stating that Massachusetts has the most significant contacts with the filing of the security interest in the renewal commissions and that Massachusetts law should be applicable. It is the Trustee's contention that if the validity of the assignment on November 10, 1938 of renewal commissions by Simon to Third National Bank is governed by Massachusetts law then in effect, such assignment is invalid as against the Trustee. It is the further contention of the Trustee that subsequent to the enactment of the Uniform Commercial Code in Massachusetts and New York, under the law of both jurisdictions the New York Uniform Commercial Code governs the continuation and perfection of the assignment, assuming it to be valid.

6. The Special Master erred at pages 18-19 of his Report, as corrected, in concluding that the assignment of renewal commissions by Simon to Third National Bank on November 10, 1938 was valid as against the Trustee under Massachusetts law, in concluding that the renewal commis-

*Objections to Special Master's Report, and
Supplemental Report.*

sions are much more in the nature of a contract right than an account receivable; and in concluding that there is some question as to the applicability of *Taylor v. Barton Child Company*, 228 Mass. 126, 117 N.E. 43 (1917) since the enactment in 1945 of Chapter 107A of the Massachusetts General Law. This statute was enacted eight years after the execution of the assignment in question and did not have retroactive effect.

7. The Special Master erred at pages 19-20 of his Report, as corrected, in finding that the assignment in the instant case was similar to an assignment of wages. His reliance upon Section 46 of New York's Personal Property Law is erroneous. The assignment in the instant case was executed on November 10, 1938, prior to the enactment of the New York Statute, which has no retroactive effect. Moreover, the Special Master had previously found that Massachusetts law was applicable.

8. The Special Master erred at page 21 of his Report, as corrected, in finding that the assignment of renewal commissions is similar to an assignment of wages. The assignment of renewal commissions is similar to an assignment of accounts receivable.

9. The Special Master erred at page 22 of his Report, as corrected, in finding that the pertinent records with respect to renewal commissions were kept in Massachusetts; that from Simon's own records all he could tell was that he had sold the policy and that a renewal premium was "due" on a given anniversary date, and that the operable act which vested the commission, the receipt of the premium by the insurance company in Massachusetts is not reflected in Simon's records. Said findings are not only not supported by the record, but are contrary to the evidence adduced. Moreover, neither the date nor the place of pay-

*Objections to Special Master's Report, and
Supplemental Report.*

ment of renewal premiums is relevant to the determination of the validity of the assignment of renewal commissions, which was executed on November 10, 1938.

10. The Special Master erred at page 23 of his Report, as corrected, in concluding that § 10-102(2) of the New York Uniform Commercial Code is not applicable to the assignment in the instant case. The case of *In Re Appli-ance Packing and Warehouse Corp.*, 475 F.2d 1011, 1013 (2d Cir. 1973), upon which the Special Master relies does not support this conclusion, and is distinguishable.

11. The Special Master erred at pages 24-25 of his Report, as corrected, in concluding that even if New York's law was applied for all purposes, its U.C.C. would not apply to an assignment of renewal commissions, since Section 9-104 thereof states that Article 9 does not apply to a "transfer of a claim for wages, salary or other compensation of an *employee*". (emphasis supplied) The Special Master erred in finding that Simon was an "employee" within the meaning of the aforesaid section. Simon was not an employee of Massachusetts Mutual but was an independent contractor. The Special Master so found at page 4 of his Report, as corrected.

12. The Special Master erred at page 27 of his Report, as corrected, in stating that at the time the Stuart judgment was perfected there was only one other outstanding lien, that being that assignment of renewal commissions to the Third National Bank. The assignment of renewal commissions to the Third National Bank did not create a lien thereon, and did not constitute a valid security interest therein.

13. The Special Master erred at page 27 of his Report, as corrected, in stating that as between Third National Bank and Stuart, the latter has stipulated that the Bank

*Objections to Special Master's Report, and
Supplemental Report.*

has priority as to all renewal commissions payable under the contract, and the Bank has conceded Stuart's priority to all sums resulting from floor plan payments and personal commissions. Although this stipulation was entered into prior to the trial of this action and prevailed during the trial, after its conclusion, and in the Reply Post-Trial Memorandum of Stuart, at the last page thereof it is stated:

". . . Thus, in addition to the sum due and owing to Simon on January 19, 1968, there must be added any subsequent *renewal commissions* or floor plan payments held by Massachusetts Mutual on behalf of Simon, in order to satisfy the judgment pursuant to which the levy was served." (Emphasis Supplied)

14. The Special Master erred at pages 27-28 of his Report, as corrected, in finding that Stuart's levy validly attached to floor plan payments and personal commissions in excess of the sum of \$7,606.85 because it was of a continuing nature. The levy validly attached to the stated sum because it was in the possession of Massachusetts Mutual at the time thereof. The subsequent payments, being contingent in nature, the levy did not attach thereto.

15. The Special Master erred at pages 33-34 of his Report, as corrected, in stating that Stuart is the priority claimant to the floor plan payments and personal commissions of Simon, at least to those which accrued prior to the appointment of the Trustee in Bankruptcy. If Stuart's levy is valid in a sum in excess of \$7,606.85, then the said levy extends not only to the floor plan payments and personal commissions of Simon, but also to renewal commissions.

16. The Special Master erred at page 39 of his Report, as corrected, in stating that the lien of the Third National Bank survived the petition in bankruptcy and vested the

*Objections to Special Master's Report, and
Supplemental Report.*

renewal commissions due when the renewal premiums were paid with a relation back to the time prior to the bankruptcy when the policies were sold. As of the date of the filing of the petition, the Trustee, as a lien creditor, had a superior claim not only to the renewal commissions which accrued subsequent to the date of bankruptcy, but to those which accrued prior thereto.

17. The Special Master erred at page 42 of his Report, as corrected, in concluding that Simon was entitled to floor plan payments which accrued after January 1, 1971. The said floor plan payments constitute assets belonging to this estate and, therefore, the Trustee in Bankruptcy has a superior claim thereto.

18. The Special Master erred at pages 2-3 of his Supplemental Report in renewing his finding that Simon failed to keep records of both commissions and renewal commissions in New York City. Said finding is not only supported by the record, but is contrary to the evidence adduced. Moreover, neither the date nor the place of payment of renewal premiums is relevant to the determination of the validity of the assignment of renewal commissions, which was executed on November 10, 1938.

Dated: New York, New York, April 11, 1974.

Respectfully submitted,

.....
SHELDON LOWE
Attorney for Robert B.
Schindler, Trustee etc.-
Intervenor
41 East 42nd Street
New York, N. Y. 10017
Tel. No. 986-1122

Memorandum.

FRANKEL, D.J.

The court has reviewed the record and the scholarly Report of the Hon. Gerard L. Goettel. The proposed findings of fact, far from seeming clearly erroneous, appear to be solidly grounded in the record. The ultimate conclusions of law are likewise approved, though the court has reservations about nonessential propositions of law stated as alternative grounds for some of the proposed rulings. While the welter of issues with which the able magistrate struggled could not have failed to generate at least a few grounds of possible difference, and while those the court has found are in no instance significant for the final result, it seems fitting to mention the points of divergence for such further proceedings as any party may choose to pursue.

1. The court does not join in the magistrate's reliance on New York U.C.C. § 9-102(1) as an additional ground for finding that "under any approach" Massachusetts law would govern. See Report at 17-18. Where intangible personal property such as a "contract right" is involved, the situs choice-of-law rule expressed in § 9-102(1) is displaced by the provisions of § 9-103. See Official Comments to § 9-103, Nos. 1 and 2. It is the latter provision, as the magistrate subsequently concludes, which governs choice-of-law questions, assuming, of course, that the U.C.C. is applicable at all.

2. It might be doubted whether the magistrate's valiant struggle with New York U.C.C. § 9-103(1) is absolutely necessary. Simon made the questioned assignment in 1938, and the last advance was effected in 1960. Simon ceased to be plaintiff's agent in 1962, almost two years before the enactment of the U.C.C. in New York. See N.Y. U.C.C. § 10-105. The magistrate's studies were necessary, however, because the New York version of the Code contains special transition provisions governing the continued validity of pre-Code security interests. See § 10-102(2)

Memorandum.

and point 4, *infra*. Whether these New York provisions are applicable to the 1938 assignment required an examination of § 9-103(1). Having traced the course of the magistrate's meticulous analysis on this point, the court adopts his finding that the pertinent records at the pertinent time were in Massachusetts.

3. A related matter—to which the parties have not paid particular attention and which the magistrate understandably passed over—is how the bank's advances following the adoption of the U.C.C. in Massachusetts should be treated—that is to say, whether these later advances should be deemed governed by the Code. Unlike New York, Massachusetts did not choose to enact special transition provisions for Article 9 interests. Instead, transactions validly entered prior to October 1, 1958, are deemed to be governed by pre-Code law. In the circumstances of this case, the bank's security interest attached, to the extent of the advances, after the Code's effective date. However, these interests were created by virtue of a pre-Code assignment which by its terms covered all future advances. This agreement was intended to govern the rights and liabilities of the parties, and was never amended or replaced. After examining the subtleties of this question—particularly whether a “transaction” occurs, for purposes of the transition provision, at the time of the last step necessary for the attachment of the interest,*—the court concludes that here it was the 1938 agreement evidencing the intent of the parties to create the interest which is the controlling transaction with regard to the transition provision. See § 9-102(1); *Empire Life Ins. Co. of America v. Valdak Corp.*, 468 F.2d 330, 333 (5th Cir. 1972); cf. *Charles S. Martin Distributing Co. v. First National Bank of Blakely*, 152 S.E. 2d 599 (Ga. App. 1966).

* See Coogan, Hogan & Vagts, *Secured Transactions under U.C.C.*, § 5.03[3] (1973).

Memorandum.

4. This court does not share the magistrate's view that *In re Appliance Packing & Warehousing Corp.*, 475 F.2d 1011 (2d Cir. 1973), would supply alternative grounds for sustaining the result herein—specifically, grounds for avoiding the requirements of § 10-102(2)(c), if New York's U.C.C. were applicable. See Report pp. 23-4. The cited decision held the U.C.C. inapplicable to the entirely distinguishable *events* there in question. Here, if New York law applied, the special transitional provisions in § 10-102 would appear to have become applicable to the facts in controversy.

5. This court has reservations about another of Magistrate Goettel's alternative holdings—that U.C.C. Article 9 would be inapplicable to renewal commissions because these are to be treated as "wages, salary or other compensation of an employee" under § 9-104(d). At least the authorities cited in this connection seem questionable in this application. And the finding that Simon was an "independent contractor," well founded in the record, generates some discomfort in treating him as an "employee." On the other hand, the essential policy purposes of the § 9-104(d) exclusion might readily be deemed pertinent, and no party here has mounted persuasive arguments for a contrary view. Given the fact that the point is not indispensable for decision herein, it may be left candidly, if not satisfyingly, in this state of doubt.

In sum, the court approves and adopts the rulings proposed by Magistrate Goettel. Proposed judgments should be submitted on notice.

It is so ordered.

Dated: New York, New York
July 3, 1974

MARVIN E. FRANKEL
U.S.D.J.

Final Judgment.

This action having come on for trial before the Court, the Honorable Marvin E. Frankel presiding, and the issues having been referred to the Honorable Gerard L. Goettel, and the issues having been duly tried, and the Special Master having rendered his Report and Supplementary Report herein, and this Court having confirmed said Report and Supplementary Report in their entirety by decision dated July 3, 1974, it is hereby

ORDERED that out of the sum of \$144,382.22 in the Registry of the Court, the Clerk of the Court pay out the following amounts:

(1) To plaintiff's counsel, Post, Hopkins & Demott, the sum of \$15,926.48;

(2) To defendant Third National Bank of Hampden County the sum of \$87,050.97;

(3) To defendant Dasha Auerbach Stuart, Executrix under the Will of Josef Auerbach, the sum of \$41,404.77; and it is further

ORDERED AND ADJUDGED that plaintiff Massachusetts Mutual Life Insurance Company shall pay from the monies held in escrow by it prior to January 1, 1973, the following sums to the following persons:

(1) To defendant Third National Bank of Hampden County the sum of \$70,711.20;

(2) To defendant Dasha Auerbach Stuart, Executrix under the Will of Josef Auerbach, the sum of \$71,000.00 plus interest at the legal rate from December 27, 1967, less (a) the \$41,404.77 paid as provided above, and (b) the sum of \$3,540.20.

(3) To the Intervenor Robert B. Schindler, as Trustee in Bankruptcy of Lawrence E. Simon, any floor

Final Judgment.

plan payments for the year 1970 remaining after the distribution to the defendant Stuart described in paragraph (2) above;

(4) To defendant Lawrence E. Simon, any floor plan payments accruing after January 1, 1971 remaining after the distributions described in paragraphs (2) and (3) above; and it is further

ORDERED AND ADJUDGED that plaintiff, Massachusetts Mutual Life Insurance Company shall pay out of any renewal commissions which have accrued to the account of Lawrence E. Simon since January 1, 1973 the following sums:

(1) To defendant Third National Bank of Hampden County an amount computed as follows: \$144,335.45 plus interest at the rate of 6½% from May 12, 1970 to date of payment, less the \$157,762.17 paid as described above;

(2) To Intervenor Robert B. Schindler, as Trustee in Bankruptcy of Lawrence E. Simon, any sums remaining after making the above payments described in paragraph (1).

Dated: New York, New York, July 29th, 1974

MARVIN E. FRANKEL
U.S.D.J.
M.A.

Judgment Entered: July 31, 1974
RAYMOND F. BURGHARDT
Clerk

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk.
By E. BECKER
Deputy Clerk

Notice of Appeal.

Notice is hereby given that Robert B. Schindler, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt, Intervenor above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on July 31, 1974.

SHELDON LOWE

SHELDON LOWE

Attorney for ROBERT B. SCHINDLER,
as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt,
Intervenor.

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United States Court of Appeals
FOR THE SECOND CIRCUIT

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

against

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPTON
COUNTY, STERLING NATIONAL BANK & TRUST COMPANY OF
NEW YORK, NATIONAL BANK OF NORTH AMERICA, DAGMAR
AUERBACH STUART, OLGA AUERBACH, HELGA RUTH JEN-
NINGS, IRVING GELST, KENNETH DEMBSKI, ROYAL S. MARKS,
SAMUEL HADDAD, NATALIE HADDAD, HENRY HECHT, SR.,
ALICE HECHT, MARY ELLEN HECHT and HENRY HECHT,
JR.,

Defendants,

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPTON
COUNTY, DAGMAR AUERBACH STUART, OLGA AUERBACH, and
HELGA RUTH JENNINGS,

Defendants-Appellees,

and

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt,

Intervenor-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

CHARLES Esposito

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides

at *12 STATE ST. VALLEY STREET*
That on *DEC 19, 1974*, he served *2* copies of *Brief + Appendix*
on

See attached

by depositing the same, properly enclosed in a securely-sealed,
post-paid wrapper, in a Branch Post Office regularly maintained by
the United States Government at 350 Canal Street, Borough of Manhattan,
City of New York, addressed as above shown.

Sworn to before me this

19th day of *DECEMBER*, 1974

John V. Desposito
JOHN V. DESPOSITO
Notary Public, State of New York
No. 20082300
Qualified in Nassau County
Commission Expires March 20, 1975

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